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In the Supreme Court of the United States

OCTOBER TERM, 1961

No. 47

ST. REGIS PAPER COMPANY, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (R. 218–33) is reported at 285 F. 2d 607. The opinion of the district court (R. 203–12) is reported at 181 F. Supp. 862.

JURISDICTION

The judgment of the court of appeals was entered on December 16, 1960 (R. 234). The petition for a writ of certiorari was filed on February 7, 1961, and was granted, limited to certain questions, on March 27, 1961 (365 U.S. 857) (R. 237–38). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

The questions presented by petitioner (Br. 2–3) are (except for slight changes in the language in its first question), the questions on which this Court granted certiorari. We believe they should be restated as follows:

1. Whether the Federal Trade Commission may obtain file copies of reports submitted by a corporation to the Bureau of the Census for the census of manufactures, where such copies are retained at the request of the Census Bureau and upon the representation that they are confidential.

2. Whether petitioner was properly held subject to the penalties that Section 10 of the Federal Trade Commission Act imposes upon corporations that fail to file special reports required by the Commission, where, within the period for compliance, petitioner failed to answer two-thirds of the questions called for in such special reports.

Another question—not raised by petitioner—is also presented. It is:

3. Whether petitioner has waived the claim that its retained copies of the census reports are privileged.

STATUTES INVOLVED

The pertinent portions of the statutes involved, the Census Act (13 U.S.C. 9, 132), the Federal Trade Commission Act (15 U.S.C. 46, 49, 50), the Administrative Procedure Act (5 U.S.C. 1005(c), 1009, and the Declaratory Judgment Act (28 U.S.C. 2201), are set forth in Appendix A, *infra*, pp. 71–79.

STATEMENT

This case arises out of a two-count civil action instituted by the United States in the District Court for the Southern District of New York. The first count (R. 1–5, 6) sought a mandatory injunction, as authorized by 15 U.S.C. 49, to compel the petitioner to comply with orders of the Federal Trade Commission directing the submission of special reports. The second count (R. 5–6) sought statutory civil penalties, as provided by 15 U.S.C. 50, for the petitioner's default in submitting such reports. The principal issues before this Court are whether, in the circumstances of the case, petitioner was correctly subjected to penalties, and whether its retained file copies of reports made to the Census Bureau in the census of manufactures are privileged against involuntary disclosure.

The proceedings before the Commission. Petitioner is the second largest manufacturer of paper and paper products in the United States (R. 2, 58; Standard & Poor's *Industry Surveys,* Oct. 21, 1961, P–8—production rank table). In September 1956, the Commission requested petitioner to submit voluntarily certain information and documents relating to nine stock or asset acquisitions it had recently made (R. 88–96). During the next 12 months, the Commission and petitioner had considerable correspondence and oral discussion about this request, but the agency succeeded in securing only eight documents from petitioner (five SEC prospectuses relating to issues of stock offered in exchange for the stock of the acquired corporations and three annual corporate reports) (R. 71–72). Petitioner also per-

mitted the Commission to inspect certain material (R. 72–73).

After failure to obtain voluntary submission of any substantial part of the information requested (compare R. 70–73 with R. 88–109), the Commission served a subpoena *duces tecum* on the corporation in 1957, requiring the production of documents relating to certain of the acquisitions that had been the subject of the 1956 letter, as well as to three additional corporate acquisitions made in the interim (R. 109–113). Petitioner complied with the subpoena, submitting among other data, copies of requested census reports (R. 82–83).

After reviewing the submitted data, the Commission found that it needed additional information to complete its investigation, and on June 30, 1958, it requested petitioner's counsel to supply further information and documents (R. 84, 114). Again there was considerable correspondence (see, *e.g.*, R. 124–162), but during the six months following the Commission's request only two of the many documents requested were submitted (one annual report and one SEC prospectus) (R. 85). Meanwhile, still other acquisitions and mergers took place (R. 86–87).

On January 6, 1959, the Commission formally initiated an investigation of the acquisitions made by petitioner since January 1, 1954 (R. 7–8). Pursuant to this resolution, and by authority of Section 6(b) of the Federal Trade Commission Act, 15 U.S.C. 46(b), the Commission issued six orders on January 9, 1959, requiring the petitioner and five of its acquired companies to file, within 30 days, special reports containing specified information and documents (R. 9–41). On June 4, 1959, the Commission

broadened its investigation to cover petitioner's acquisition of the stock or assets of two additional corporations subsequent to the date of the first resolution (R. 42–43). Pursuant to this second resolution, the Commission, on June 8, 1959, issued further orders, requiring petitioner and the two newly acquired companies to file, within 30 days, special reports containing specified information and documents relating to these acquisitions (R. 44–53). The orders directing the filing of the special reports specified in detail the information to be submitted, broken down into topics and subtopics. In addition, petitioner was directed to submit designated documents, including copies of census reports. The nine orders for special reports called for the submission of 358 separate items of information or documentary material.

The six reports required by the first set of orders had originally been due on February 8, 1959. Because of an extension of time granted in connection with petitioner's motion to vacate the first resolution and the first six orders (R. 163–70), the reports finally became due on May 28, 1959. The three reports required by the second set of orders were due on July 8, 1959. During this entire period, from February through July 1959, petitioner furnished the Commission with the several documents requested in item 1(b) of the first order, and one annual report and two Securities and Exchange Commission prospectuses which contained matter that partially answered various questions in the nine orders for reports (R. 86–87). The latter three documents were submitted unmarked, and there was no way to determine, from the

manner in which they were submitted, what questions, if any, they purported to answer.

The court proceedings. Section 10 of the Federal Trade Commission Act, 15 U.S.C. 50, provides that a corporation that fails to file any special report required by the Commission shall forfeit $100 a day for each day that such failure to file continues after 30 days "after notice of such default." The Commission served the statutory notices of default for the first set of orders on June 20, 1959, and for the second set on July 24, 1959 (R. 53–58, 87). Petitioner took no further steps to comply, and on September 15, 1959, more than three years after the Commission had instituted this antimerger investigation, the United States filed this civil action. The complaint (R. 1–7) sought (1) enforcement of the nine orders and (2) recovery of the statutory civil penalty for default in excess of 30 days.

The nine orders contained 358 separate requests for information. (See tabulation, *infra*, pp. 80–90). Prior to the Commission's issuance of the notices of default, the petitioner had answered 52 (15%) of these requests. It answered an additional 72 of them (20%) in its post-trial memorandum in the district court by referring to certain documents it had submitted both before and after the default date; and it answered another 33 requests (9%) for the first and only time in its post-trial memorandum. Thus, 263 of the requests had not been answered when the action was instituted, 201 when the district court entered its final judgment.[1]

[1] The data in this paragraph, and those in the next paragraph in the text, are derived from the tabulation in Appendix C, *infra*, pp. 80–90. The data are summarized in the graph in Appendix D, *infra*, p. 91.

The district court rejected petitioner's contention that the Commission had no authority to utilize the special reports procedure of Section 6(b) of the Act as a means of obtaining information in an investigation under Section 7 of the Clayton Act (R. 206–207). It held, however, that 43 of the 358 requests for information (12%) were "vague and uncertain" (R. 209), and that petitioner therefore need not respond to them (R. 210–211). The court required answers to the remaining 158 requests "which are enforceable and have not been answered" (R. 210–212), including 21 requests (6%) covering retained copies of census reports (R. 208). Finally, the district court rejected the government's claim for forfeitures. It ruled (R. 212) that since the orders on which the forfeiture claims were based "are partially defective" and since it was enforcing "only * * * those portions of the orders which we find unobjectionable * * * the Government has no right to forfeitures under the circumstances."

Both parties appealed. The court of appeals upheld the district court's order insofar as it directed the petitioner to submit the special reports (including the furnishing of the retained copies of the census reports) (R. 224–229), but it reversed the district court insofar as the latter refused to award forfeitures. The court stated (R. 229–230) that this case involved no "such mitigating circumstances" as "a simple oversight or an honest mistake in a good-faith attempt to comply with the Commission's order." Here the petitioner "refused to accede to many of the Commission's requests for documents and information on the

sole ground that the Commission had no authority to demand what was requested." The court further ruled (R. 231–233) that petitioner could have directly challenged the order requiring the submission of the special reports under either the Declaratory Judgment Act or the Administrative Procedure Act, and that "the exaction of the statutory penalties for noncompliance is fair in any case in which the respondent awaits a mandamus action before contesting the agency's demands, and the order is held valid." [18]

SUMMARY OF ARGUMENT

I

A. Petitioner has waived any claim that the retained copies of its census reports are privileged. Prior to the issuance of the special orders petitioner voluntarily furnished the Commission, at its request and without any claim of privilege, copies of other reports which it had made to the Census Bureau for the census of manufactures. Furthermore, although petitioner objected before the Commission to some of the earlier requests for information, it never claimed that the census reports were

[18] Following the decision below, the court of appeals (one judge dissenting) denied petitioner's motion for an order postponing the effective date of the Commission's order until the completion of further proceedings in this Court (R. 235). Petitioner renewed that motion in this Court. In its order granting certiorari (R. 238), this Court granted the motion "to the extent of tolling * * * the further running and accumulation of forfeitures" from February 7, 1961, the date on which the petition for certiorari was filled. The order further stated (*ibid.*) that petitioner's liability for forfeitures prior to that date "is to abide the event of this litigation."

privileged. The claim was first made in the district court.

Privileges arising out of a confidential relationship, such as lawyer and client, doctor and patient, and husband and wife, are waived by voluntary disclosures which are inconsistent with, or demonstrate indifference to, the existence of a true confidential relationship. The theory upon which retained copies of reports made to the Census Bureau are privileged against disclosure is that there is a confidential relationship between the reporting company and the Census Bureau, created by Congress in order to encourage free and full submission of statistical data. Where the reporting company itself makes retained copies of census reports public, as the petitioner did in the present case by furnishing a number of them to the Commission, it becomes manifest that the company no longer views its relationship with the Census Bureau as confidential with respect to the particular subject to which the reports relate.

The waiver was not limited to the particular reports which petitioner voluntarily supplied. Petitioner also waived any claim of privilege for other reports "relating to the specific subject" (*In re Associated Gas & Electric Co.*, 59 F. Supp. 743, 744 (S.D. N.Y.)) which it chose not to treat as confidential. Here the "specific subject" was the series of corporate acquisitions which the Commission was investigating. All the requests for information, both those in response to which petitioner produced census reports and those in the instant case in which it refused to produce them, were part of a single Commission proceeding.

The enforcement and penalty proceeding in the district court, in which petitioner for the first time raised the claim of privilege, was ancillary to the Commission investigation, and the waiver of the privilege before the Commission also barred its assertion before the district court.

B. The question whether the Commission may obtain retained copies of required census reports involves difficult and conflicting considerations of law and policy with much merit on either side. The Federal Trade Commission and the Antitrust Division of the Department of Justice are of the view that the privilege against disclosure of reports made to the Census Bureau, created by Section 9 of the Census Act, does not extend to copies retained by the reporting companies, and that to so extend it would seriously handicap enforcement of the antitrust laws. The Department of Commerce and the Bureau of the Budget, on the other hand, believe that the statutory privilege does cover copies retained at the request of the Census Bureau, and that to deny confidential treatment to such copies would jeopardize the government's statistical reporting program.

Instead of burdening the Court with briefs from different agencies we attempt here to set forth the competing arguments as effectively and objectively as possible. The Solicitor General is of the view that, if the Court reaches the question, the statutory privilege should extend to the retained copies but not to the underlying data in the company's books and records upon which the reports are based.

II

Section 6(b) of the Federal Trade Act authorizes the Commission to require corporations to file "annual or special * * * reports." Section 10 provides that if any corporation "required * * * to file any annual or special report shall fail so to do * * * [it] shall forfeit to the United States the sum of $100 for each and every day of the continuance of such failure." The Commission, as part of a formal investigation instituted under Section 7 of the Clayton Act, ordered petitioner (and seven corporations it had recently acquired) to file nine special reports related to this and other corporate acquisitions. The reports called for 358 items of information or documentary material. As of the time when the suit for penalties was filed, petitioner had answered only 15% of the questions; the district court held that another 12% of them were "so indefinite as to be unenforceable" (R. 211); and 6% related to requests for census reports which may have been privileged. Petitioner was in default as to the remaining two-thirds of the questions. While petitioner answered another 29 percent of the questions in its post-trial memorandum, those answers cannot properly be included in determining the extent of petitioner's default. But even accepting petitioner's own calculations, it still admittedly had defaulted on approximately one-third of the questions. The court of appeals correctly held that petitioner, by such substantial non-compliance, had incurred the statutory penalty for failure to submit special reports.

A. As the court of appeals pointed out (R. 229–230), this is not "a case involving a single oversight

or an honest mistake in a good-faith attempt to comply with the Commission's order * * *." Here, petitioner's primary ground for refusing to comply was its belief that the Commission had no authority to obtain the reports. Since that claim is unfounded the litigant should incur whatever penalty the statute imposes for non-compliance. Petitioner's failure to comply with two-thirds of the items in the orders for special reports constituted a failure to file the reports within the meaning of the statute, and petitioner was properly subjected to the statutory penalties. *Bowman Dairy Co.* v. *United States,* 341 U.S. 214, does not support petitioner's claim that the partial invalidity of the Commission's orders barred the assessment of penalties.

Nor were penalties improperly assessed because the district court, upon concluding that the orders were partially invalid, enforced the valid portions of the orders instead of remanding to the Commission to issue new orders. In so doing, the district court did not convert the Commission's orders into its own orders; it merely lent its authority to compel obedience. Petitioner incurred the penalties when it failed to file the reports ordered by the Commission, and neither the extent nor the method of subsequent judicial enforcement affected its liability therefor.

B. The court of appeals correctly held that, prior to the institution of the government's suit for penalties, petitioner might have brought an action in the district court, under either the Declaratory Judgment Act or Section 10(c) of the Administrative Procedure

Act, to test the Commission's orders. *Federal Trade Commission* v. *Claire Furnace Co.*, 274 U.S. 160, decided before either of those Acts was passed, does not stand in the way of such direct judicial review. In *United States* v. *Morton Salt Co.*, 338 U.S. 632, 654, this Court, in upholding the power of the Commission to require special reports, strongly intimated that such direct review could be obtained in order to avoid accrual of penalties. In any event, since petitioner made no attempt to seek direct judicial review of the Commission's orders, it cannot now be heard to argue that, if it had done so, the court would not have entertained the suit. Petitioner had ample opportunity to institute such an action during the six months between the issuance of the first orders to report and the notices of default on the last.

C. Section 6(b) of the Act authorizes the Commission to require the filing of "annual or special * * * reports or answers in writing to specific questions," and Section 10 imposes penalties for failure to file any "annual or special report." Petitioner argues that since the reports ordered by the Commission called for answers to specific questions, they ceased to be "special reports," within the meaning of Section 6(b); and that a corporation that fails to furnish "answers * * * to specific questions" is not liable for penalties but is subject only to a proceeding to compel it to answer.

But a "special report" does not cease to be such merely because the Commission calls for answers to specific questions. Indeed, any order for a special report must set forth in specific detail the informa-

tion required, for this is necessary in order to enable the recipient to understand what is requested. The simplest—and best—method for insuring such clarity is to ask specific questions. Both the legislative history of Section 6(b) and the general design of the statute indicate that "answers in writing to specific questions" are not a separate category from an "annual or special report"; they are merely illustrative of what such a report may require. A corporation that fails to answer "specific questions" called for in a special report incurs the statutory penalty for failure to report.

ARGUMENT

I

PETITIONER WAS BOUND BY THE ORDER OF THE FEDERAL TRADE COMMISSION TO PRODUCE THE RETAINED COPIES OF ITS CENSUS REPORTS

The major issue mooted in this case, in terms of public importance, is whether petitioner was privileged to refuse to supply the Federal Trade Commission with the file copies which it had retained of reports submitted to the Census Bureau for the census of manufactures. The reports were submitted under compulsion of 13 U.S.C. 221 and 224. The original and file copies [2] bore the legend—

> *Confidential.*—This report is required by Act of Congress, approved August 31, 1954 (13 U.S.C. 131 and 224). Your report is confiden-

[2] The forms for the original and copy of one of the reports involved in this case are reprinted in Appendix B, *infra*, pp. 79a, 79b.

> tial and only sworn Census employees will have access to it. It cannot be used for purposes of taxation, investigation or regulation.

Immediately below there appeared on the copy in block letters—

KEEP THIS COPY FOR YOUR FILES

Petitioner asserts that upon these facts a privilege arises under 13 U.S.C. 9 not to furnish investigatory agencies with the retained copies of the census reports. We canvass this very difficult question at pages 25–49 below, but we believe that it need not be decided in the present case because whatever privilege exists was waived by petitioner.

At earlier stages of its investigation into the series of corporate acquisitions made by petitioner since January 1, 1954, the Commission had sought from petitioner copies of other census reports. Petitioner voluntarily furnished a number and made no claim that any were privileged. Furthermore, before the Commission, although petitioner objected on various grounds to the agency's requests for data (including the special reports involved in this case), petitioner never contended that the copies of the census reports were privileged. Petitioner sought to raise the claim for the first time in the district court, as a defense to the suit to compel compliance and for penalties. We submit that the afterthought came too late[3] and that

[3] In our memorandum in response to the petition (p. 2), as well as in our brief in the court of appeals, we indicated the factual basis upon which our present claim of waiver rests.

whatever privilege might have existed had been waived.

A. *By Voluntarily Furnishing the Commission with Some Retained Copies of Census Reports and Making No Claim of Privilege before the Commission, Petitioner Waived any Right to Assert that the Reports Are Confidential.*

1. The facts with respect to petitioner's voluntary submission of the other census reports and its failure to claim any privilege for them, are as follows:

The Commission's original request for information, contained in its letter of September 7, 1956, did not ask for census reports; it merely requested petitioner to furnish specified data (R. 88–96). At a conference between counsel for the Commission and for petitioner, held on September 25, 1956, the latter "was told that schedules or reports submitted by St. Regis and the acquired corporations to the Bureau of the Census for specified years would be accepted in lieu of the data requested" in the letter (R. 70). In February 1957, a Commission representative examined, at the office of petitioner's counsel, the 32 retained copies of petitioner's census of manufactures reports listed at R. 72–73.

Following further unsuccessful attempts to obtain additional information voluntarily (compare R. 88–109 with R. 71–73), the Commission on September 16, 1957, served on petitioner a subpoena *duces tecum*, calling upon it to produce, among other things, "[d]uplicate copies of the complete reports" submitted to the Bureau of the Census for the 1954 census of manufactures by five designated companies (R.

73–74, 109–110, 112). Petitioner moved to quash the subpoena, the Commission denied the motion (R. 74), and petitioner then submitted to the Commission census reports for two of the five companies (R. 74, 82–83). These were not copies retained by the companies, but photocopies of the originals, which the companies apparently obtained from the Bureau of the Census (see R. 82).

The retained copies involved in the instant case were called for by the Commission's orders of January 9, and June 8, 1959, directing the submission of special reports. Although petitioner filed a motion with the Commission to vacate that order, it made no claim that the census reports were privileged (R. 164–167). The grounds upon which it challenged the order was that Section 6 of the Federal Trade Commission Act did not authorize the Commission to obtain special reports in connection with an investigation of alleged violations of Section 7 of the Clayton Act, and that the order itself was unduly broad, was burdensome, and was unnecessary (*ibid.*).

The first time that petitioner challenged the Commission's demand for production of the retained copies on the ground that they were "confidential and privileged" was in its answer to the complaint in the district court (R. 62), filed on October 23, 1959 (R. 58). This was more than two years after the Commission had first resorted to compulsory process to obtain copies of census reports, and more than nine months after it had called for copies of the particular reports involved in this case.

2. Privileges arising out of a particular relationship, the confidential character of which the law deems it important to protect, are waived by voluntary disclosures of what transpires within the relationship which are inconsistent with, or demonstrate indifference to, the existence of a true confidential relationship. This is the rule with respect to privileges covering communications made within such traditionally confidential relationships as attorney and client, husband and wife, and physician and patient. 8 Wigmore, *Evidence* (3d ed.), Secs. 2327, 2340, 2389–2390; McCormick, *Evidence* (1954), pp. 176, 197–199, 217–220. For when parties to a normally confidential relationship show, by their own acts of voluntary disclosure, that they do not view the particular transaction or subject as in fact a confidential one, the basis for confidentiality disappears, and there is no reason for providing confidential treatment for the communications. Thus, "[t]he client's offer of his own or the attorney's testimony as to a *specific communication* to the attorney is a waiver as to all other communications to the attorney on the same matter * * *." 8 Wigmore, *Evidence* (3d ed.), Sec. 2327.

An example of the application of this principle is *In re Associated Gas & Electric Co.*, 59 F. Supp. 743 (S.D. N.Y., 1944), which was a proceeding in the bankruptcy court involving a corporate reorganization. The question in that case was whether the privilege as to certain communications between attorney and client, relating to the client's knowledge of a proposed bond issue in 1932, had been waived

because of the voluntary disclosure of other communications between them. The documents were contained in the files of the Trinway Corporation. Two of them (Trustee's Exhibits Nos. 13 and 14) were communications received by the Trinway Corporation's predecessor from its then attorneys; the other four were from the files of such attorneys, consisting of communications between them and the predecessor, and their interoffice memoranda. In 1941 the President of the Trinway Corporation, testifying before a special master in the reorganization proceedings, produced Trustee's Exhibits Nos. 13 and 14, identified them, and permitted them to be marked as exhibits in the proceeding, "without assertion of the claim of privilege or other objection" (p. 744). The district court held that such action constituted a waiver of the attorney-client privilege as to all six documents, and that the Referee in Bankruptcy had therefore correctly rejected the claim of privilege. (The proceeding before the Referee apparently took place two or three years after the production of the two exhibits in 1941.) The court stated (*ibid.*, emphasis added):

> * * * In my opinion when Trinway produced Trustee's Exhibits Nos. 13 and 14 in the litigation before the Special Master and its President took the stand as a witness to identify them and without any objection allowed them or photostatic copies of them to be marked as exhibits in the proceeding, there was what amounted to an intentional waiver of the right to claim that the papers were privileged communications between attorney and client.

> *The privilege is not divisible. The petitioners having waived as to some of the letters relating to the specific subject open the door to all the privileged correspondence between it and its attorney on that specific subject* [*i.e.*, the 1932 bond issuance].

Other illustrative cases in which this principle has been applied are *Hayes* v. *Ricard*, 244 N.C. 313, 93 S.E. 2d 540, in which the examination of an attorney with respect to the purchase of land was held to have waived any privilege with respect to other attorney-client communications about such land; *Epstein* v. *Pennsylvania R.R.*, 250 Mo. 1, 156 S.W. 699, in which a patient's waiver of the physician-patient privilege to permit testimony by one doctor who treated him was held to waive it with respect to testimony by other doctors who had also treated him;[*] *Chamberlain* v. *Chamberlain*, 230 S.W. 2d 184, 188–89 (Mo. App.), where waiver of the privilege with respect to some confidential communications (letters) between husband and wife was held to constitute a waiver of any privilege covering any other relevant communications between them (such as a telephone call) on other matters, since the "waiver goes to the relationship and when exercised as to some confidences which could otherwise be excluded it opens the door for proof of other communications"; and *Driver* v. *Driver*, 52 N.E. 401 (Ind.), holding that a husband who, in attempting to prove his wife's unchastity in a divorce

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[*] Accord: *Chaffee* v. *Kaufman*, 113 Kan. 254, 214 Pac. 618; *In re Quick's Estate*, 161 Wash. 537, 297 Pac. 198; *Steinberg* v. *N.Y. Life Ins. Co.*, 263 N.Y. 45, 188 N.E. 152; *Hudman* v. *State*, 205 P. 2d 1175, 1183 (Okla. Cr. App.)

case, revealed some confidential communications between them reflecting such unchastity, also waived any privilege as to subsequent affectionate communications between them.

3. Similar considerations support the conclusion that petitioner, by voluntarily submitting to the Commission some of its retained copies of reports made to the Census Bureau for the census of manufactures, waived any claim that the remainder of such reports are privileged.

The theory upon which retained copies of reports made to the Census Bureau are privileged against disclosure is that there is a confidential relationship between the reporting company and the Census Bureau, created by Congress in order to encourage free and full submission of statistical data to the government. See *infra*, pp. 36–39, 43–44. That relationship is comparable to the traditional relationships, such as attorney and client, for which the law provides a privilege in order to encourage and facilitate the full and frank communication that is essential to effective functioning of that relationship. For example, a doctor could not treat his patient properly unless the latter felt free to speak to the doctor fully and freely, secure in the knowledge that such information would not be made public without his consent, no matter how incriminating or embarrassing it might be. Similarly, the Census Bureau believes that it could not properly perform its function of obtaining and distributing vital statistical information, unless the reporting companies present their material freely and candidly,

without fear that it might subsequently be made public to their detriment.[5]

Where, however, the reporting company itself makes retained copies of census reports public (as petitioner did in the instant case by voluntarily furnishing a number of them to the Commission), it shows that, with respect to the particular subject to which such reports relate, the company no longer views its relationship with the Census Bureau as confidential.[6] There is no reason to continue to enforce the statutory privilege for census reports when the company itself has ceased to treat them as confidential.

When petitioner voluntarily furnished the Commission with copies of a number of its census reports, it obviously waived its privilege with respect to those

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[5] For a more detailed discussion of the need for confidentiality see pp. 36–39, 43–44 below.

[6] A further indication of this fact is that petitioner, when it moved to vacate the Commission's order calling for a special report, made no claim that the retained copies of the census reports sought were privileged. It seems reasonable to assume that, if petitioner viewed such reports as confidential, it would have raised this point in its motion to vacate—particularly since the Federal Trade Commission Act imposes substantial penalties for failure to file any special report (see *infra*, pp. 49–58).

If petitioner had contended before the Commission that the retained copies were privileged, the Commission might have avoided the problem by rescinding its demand to seek the underlying information instead of the census reports, and then giving petitioner the option to submit the reports in lieu of such data. A demand for information in that form would have raised no question as to disclosure of privileged material. See *infra*, pp. 30–32. Indeed, the Commission had followed that practice in its earlier informal request for information. It there initially sought specific data (R. 91–93) and then advised petitioner that, in place thereof, it might submit census reports (R. 70).

reports. But since the privilege for census reports is based on the need for preserving the confidential character of the relationship between the reporting company and the Census Bureau, such waiver was not limited to the particular reports that were supplied. Petitioner also waived any claim of privilege for other reports "relating to the specific subject" (*Associated Gas & Electric Co., supra*) which it was no longer treating as confidential. For what it was waiving was not a privilege for particular documents, but for the relationship which the privilege is designed to protect.

The "specific subject" with respect to which petitioner waived its privilege was the series of corporate acquisitions which were under investigation by the Commission. The Commission's original informal request for information, in response to which petitioner permitted the Commission to examine 32 schedules of its census reports (R. 72–73), stated that the Commission was investigating the acquisition by petitioner of nine specified companies, "to determine whether the said acquisitions, or any of them, may be in contravention of Section 7 of the Clayton Act" (R. 88–89). Similarly, the Commission's subpoena *duces tecum*, in response to which petitioner again submitted copies of some census reports (R. 74, 82–83), called for production of "All paper writings, written or received since January 1, 1955, which refer or relate to the desirability, necessity or other reasons bearing on the decision of St. Regis Paper Company to acquire the securities or assets" of six specified companies, the first four of which had also been listed in the earlier informal request for information (R.

110, 88–89). Finally, the Commission's order requiring petitioner to file the special report (R. 9) stated that such submission was being directed pursuant to a Commission resolution, a copy of which was enclosed, which instituted an investigation of the "Acquisition by St. Regis Paper Company of the Stock or Assets or Both the Stock and Assets, of Other Corporations" (R. 7, 9). All of these requests and demands for information were made in connection with a single Commission proceeding, namely, the investigation of the legality under Section 7 of the Clayton Act of petitioner's corporate acquisitions. Moreover, as to itself and three of the acquired companies (Pacific Waxed Paper Co., Pollock Paper Corp., and Rhinelander Paper Co.) whose retained copies were sought in the special report, petitioner had previously voluntarily submitted copies of other census reports (R. 11, 72, 115; 32, 82; 35, 82–83; 40, 82).

Thus, when petitioner voluntarily submitted to the Commission copies of some census reports, it waived its privilege to bar disclosure of any other census reports that related to the Commission's investigation of its corporate acquisitions. The copies of the reports involved in the instant case were sought in connection with that investigation, and they therefore related to the "specific subject" (*Associated Gas & Electric, supra*) as to which petitioner had waived its privilege. In these circumstances, petitioner could not validly make any claim of privilege for such reports. "The privilege is not divisible," and petitioner "having waived as to some of the" reports, "open[ed] the door to all * * *" (*ibid.*).

The enforcement and penalty proceeding in the district court, in which petitioner for the first time raised the claim of privilege, was ancillary to, and in implementation of, the administrative proceeding. Accordingly, petitioner's waiver of its privilege before the Commission also operated to bar it from asserting the privilege in the district court action brought by the United States, at the Commission's request, in aid of the Commission proceeding. As Mr. Justice Holmes stated, when he was Chief Justice of the Massachusetts Supreme Judicial Court, in holding that the waiver of the attorney-client privilege at an earlier hearing in the probate court operated to bar its assertion in a subsequent proceeding involving the trustees' accounting, "The privacy for the sake of which the privilege was created was gone by the appellant's own consent, and the privilege does not remain in such circumstances for the mere sake of giving the client an additional weapon to use or not at his choice." *Green* v. *Crapo,* 181 Mass. 55, 62, 62 N.E. 956, 959.

B. ***Considerations Bearing on the Right of the Federal Trade Commission to Obtain Retained Copies of Census Reports.***

The question whether a privilege of confidentiality attaches to copies of census reports arises not merely because of the private interest of petitioner in resisting an investigation which might lead to adversary proceedings for violation of the antitrust laws. Its more significant source is the collision of two public interests. There is a strong public interest in having all pertinent and reliable data readily available as

evidence in judicial and administrative proceedings, regardless of how the evidence cuts, which interest includes, but is not confined to, the government's interest in being able to obtain the retained copies of census reports because they often facilitate the effective enforcement of the antitrust laws. See pp. 39–42 below. On the other hand, there is an opposing public interest in the gathering of accurate and detailed statistical studies concerning our national needs and resources. The Census Bureau experts believe, for reasons which we detail at pp. 36–39 below, that this interest is advanced by having copies of business reports to the Bureau retained in the files of the reporting firms, and that the willingness of business concerns to retain their copies depends upon the privilege of secrecy.

The language of Section 9 of the Census Act is not so clear as to prevent these conflicting interests from giving rise to reasonable differences of opinion concerning its application to a private person's retained copies of census reports, at least when the copies are kept at the request of the Census Bureau. The several interested departments and agencies of the federal government have adopted inconsistent positions. The Federal Trade Commission, which originally requested the retained copies of petitioner's census reports, believes that in the absence of any indication by the Congress to the contrary either in the statute or its legislative history, the privileged status of census reports in the possession of the Census Bureau does not extend to copies retained by the reporting concern, even though these copies bear a

legend placed therein by the Bureau without explicit statutory authorization. The Commission also believes that any extension of the statutory privilege would seriously hamper it in obtaining evidence necessary for the effective performance of its law enforcement duties under the Federal Trade Commission and Clayton Acts. The Antitrust Division of the Department of Justice, which brought this action in the name of the United States at the request of the Federal Trade Commission to compel compliance and collect penalties for failure to comply with the request, shares the Commission's view. The Census Bureau, the Department of Commerce, and also the Bureau of the Budget, which is charged with an interdepartmental responsibility for various questionnaires, have all adopted the view that the retained copies are not subject to legal process and have so informed reporting companies.

The Solicitor General, while fully recognizing the delicate balance of opposing considerations, is satisfied that upon this issue the ruling below is wrong—that the privileged status given to census reports in the possession of the Census Bureau extends to copies of compulsory reports retained by the reporting concern at the Bureau's request and for its purposes. In the present situation, however, the issue cannot appropriately be rendered moot merely by conceding the point. The United States insists that petitioner waived any privilege and therefore is unwilling merely to dismiss that part of the action which seeks to compel the production of the copies (see pp. 16–25, above). Furthermore, if the point is reached,

the public interest would be best served by a decision by this Court. The existence of reasonably differing opinions, not only among government agencies but between the Courts of Appeals for the Second and Seventh Circuits,[1] shows that the question cannot otherwise be put to rest. The case was brought at the request of the Federal Trade Commission, which has an independent responsibility for performing its statutory functions, and the Commission is not persuaded by the reasoning of the Solicitor General. Furthermore, as an independent administrative agency, the Federal Trade Commission, unlike the Antitrust Division, is not subject to the Solicitor General or the Department of Justice in litigation in the inferior federal courts. In combination, these circumstances furnish persuasive reasons for submitting the issue for decision by this Court after canvassing all sides of the question.

NATURE OF THE ISSUE

The precise question presented for decision in this case is whether copies of compulsory census reports retained in the petitioner's files at the request of the Census Bureau are subject to subpoena. A very similar, perhaps identical, issue might arise with respect to the voluntary interim reports which business firms frequently make to the Census Bureau at its

[1] In *Federal Trade Commission* v. *Dilger*, 276 F. 2d 739 certiorari denied, 364 U.S. 882, the Seventh Circuit held that the Commission could not obtain retained copies of census reports. In holding to the contrary in the present case, the Second Circuit explicitly stated (R. 228–229) that it "disagree[d]" with *Dilger*.

request but which they are under no legal compulsion to file. The Department of Commerce and the Bureau of the Budget feel that no distinction can properly be drawn and that their success in getting voluntary reports depends upon the originals and copies being accorded the same confidential status as compulsory reports. Although it may well be true that both compulsory reports and their copies and voluntary reports and their copies have the same legal status in respect of disclosure or privilege, the latter are not involved in this case and it is possible that at some points distinctions might be drawn. Accordingly, this brief deals only with the precise issue before the Court—the status of copies of compulsory reports—and it phrases the relevant propositions of law in those terms. However, we do not intend to imply that the government would take any different position with respect to voluntary reports or their copies.

The question lies midway between two propositions with respect to which the law seems clear but which ought to be plainly articulated by this Court in order to avoid future litigation.

First, all reports made to the Census Bureau under compulsion of law are privileged, while in its possession, against subpoena or other legal process. Although Section 9 of the Census Act in terms prohibits merely the voluntary disclosure of data from individual reports in the possession of the Bureau by employees of the Department of Commerce, the reports are not subject to legal process.

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Second, the fact that a business concern has made a report to the Census Bureau does not diminish its obligation to furnish information, reports or documents to other government agencies such as the Federal Trade Commission in response to subpoenas, interrogatories, discovery, or other legal process. The situation is to be viewed pretty much as if the census report did not exist, and indeed had never been made. The other government agencies cannot obtain the report from the Census Bureau. The status of retained copies is in issue here, and the right of investigators to ask, "What information did you give the Census Bureau," would seem to be governed by whatever rule is applicable to retained copies. Reserving this point, parties to litigation and the investigatory and regulatory agencies have exactly the same rights to interrogate business firms and to subpoena papers as they would if there were no census reports. The fact that a company has given certain information to the Census Bureau does not excuse the firm from giving accurate information upon the same subjects (which may be the same information) to the Federal Trade Commission or other branches of the government. This is made clear by 13 U.S.C. 132, which provides that nothing in the Census Act "shall be deemed to revoke or impair the authority of any other Federal agency with respect to the collection or release of information." All the government departments and agencies mentioned above, including the Census Bureau, concur in this view.

To illustrate the point specifically, the census of manufactures form requests companies such as petitioner to furnish estimates of the value of their products, broken down into specified categories with further breakdowns showing interplant transfers within the company. Under Section 6 of the Federal Trade Commission Act the Federal Trade Commission has the power to ask a company in interstate commerce for precisely the same information. Indeed, although the Commission could not properly require the company to disclose what responses it made on the census form, surely the Commission could properly explain that its questions referred to exactly the same categories and carried the same meaning as the questions put by the Census Bureau. (The clarification would be important because the Commission often wishes to compare the figures for individual companies with the published Census figures for all manufacturers.) The company would satisfy any legal duty by giving an honest response to the Commission, even though it differed from the answer furnished the Census Bureau; but it would be required to answer.

It follows that we reject, and ask the Court specifically to repudiate, any contrary implication in the *Dilger* case where the Seventh Circuit said (276 F. 2d 739, 743, emphasis in original)—

> *It* [the Federal Trade Commission] *now seeks to do indirectly that which it cannot do directly.* We cannot believe the Congress intended such a result.

This statement is unobjectionable if it means only that the Federal Trade Commission may not indirectly obtain the contents of the actual census reports by subpoenaing copies retained at the request of the Census Bureau or by inquiring, "What did you report to the Census Bureau." Unfortunately, the *Dilger* opinion has been widely interpreted as meaning that other government agencies cannot obtain from other data in a company's files the same information that the company furnished the Census Bureau, thus extending the cloak of the census privilege to all information in a company's possession bearing upon subjects upon which it has given information to the Census Bureau. To sustain petitioner's position and the result of the *Dilger* case without repudiating this interpretation would be productive of unnecessary litigation and delay in the enforcement of the antitrust laws.

The present issue lies between these two areas in which the law seems clear. The retained copies, by hypothesis, are not in the possession of the Census Bureau. Petitioner was under no legal obligation to retain them. On the other hand, the copies were created by the census; presumably they would not otherwise exist. And although many companies would undoubtedly keep copies for their own use, the Census Bureau requests their retention because it believes that otherwise many other companies would not keep them on file where their availability greatly facilitates the checking and clarification of the original census reports in the possession of the Census Bureau.

STATUTORY LANGUAGE

Section 9(a) of the Census Act provides—

> § 9. *Information as confidential; exception*
>
> (a) Neither the Secretary, nor any other officer or employee of the Department of Commerce or bureau or agency thereof, may, except as provided in section 8 [*] of this title—
>
> (1) use the information furnished under the provisions of this title for any purpose other than the statistical purposes for which it is supplied; or
>
> (2) make any publication whereby the data furnished by any particular establishment or individual under this title can be identified; or
>
> (3) permit anyone other than the sworn officers and employees of the Department or bureau or agency thereof to examine the individual reports.

Literally construed, the statute sustains the view of the Federal Trade Commission and shows petitioner's interpretation to be wrong. As Chief Judge Lumbard said in the court below, "the plain terms of that statute apply only to the Department of Commerce and do not bar any other federal agency from divulging such information if it comes from different sources or from demanding that a copy remaining in the respondent's files be produced" (R. 228).

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[*] Section 8 authorizes the Secretary of Commerce to furnish certain information from censuses of population, agriculture and housing, under specified conditions. Section 8 does not apply to the census of manufactures. Section 9(a) refers to all censuses under the Act, except for the censuses of governments, excluded by Section 9(b).

The spontaneous reading is confirmed by comparing the Census Act with other legislation. The Internal Revenue Code makes income tax returns confidential within the Internal Revenue Service, subject to release by the President, 26 U.S.C. 6103, 7213(a), yet any copies which a taxpayer keeps in his files are subject to discovery and subpoena in all kinds of litigation.* The Criminal Code prohibits federal employees from disclosing trade secrets and other business data of which they acquire knowledge in the course of their official duties, 18 U.S.C. 1905, but the same information can be obtained from a reporting firm by ordinary judicial process. When Congress wished to prevent reports or records prepared for the government from being used in litigation, it has adopted unequivocal words. For example, 45 U.S.C. 41 provides that the reports of accidents made by interstate railroads shall not "be admitted as evidence or used for any purpose in any suit or action for damages growing out of any matter mentioned in said report or investi-

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* *E.g.*, *Star* v. *Rogalny*, 22 F.R.D. 256, 258 (E.D. Ill.); *Rush* v. *Chicago B. & Q.R. Co.*, 22 F.R.D. 188, 189 (D. Neb.); *Kingsley* v. *Delaware L. & W.R. Co.*, 20 F.R.D. 156, 158–9 (S.D. N.Y.); *Karlsson* v. *Wolfson*, 18 F.R.D. 474, 476 (D. Minn.); *Tollefsen* v. *Phillips*, 16 F.R.D. 348, 349 (D. Mass.); *Reeves* v. *Pennsylvania R. Co.*, 80 F. Supp. 107, 108 (D. Del.); *The Sultana*, 77 F. Supp. 287, 288 (W.D. N.Y.); *Connecticut Importing Co.* v. *Continental Distilling Corp.*, 1 F.R.D. 190 (D. Conn.); *Currier* v. *Allied New Hampshire Gas Co.*, 101 N.H. 205, 137 A. 2d 405. In a number of cases, taxpayers who had not retained copies of their tax returns were directed by the courts to obtain such copies from the government and produce it for use in the proceeding. *E.g.*, *Kingsley* v. *Delaware L. & W.R. Co.*, *supra*; *Tollefsen* v. *Phillips*, *supra*; *Reeves* v. *Pennsylvania R. Co.*, *supra*.

gation." See also 49 U.S.C. 320(f). There is no such language in the Census Act.

If the question were to be decided upon the bare words of the statute, one would surely conclude that the decision below was correct. This conclusion is fortified, moreover, by a presumption that statutory constructions having the effect of suppressing otherwise competent evidence are to be avoided where not required by the statutory words. Cf. *Connecticut Importing Co.* v. *Continental Distilling Corp.*, 1 F.R.D. 190, 191–2 (D. Conn.).[10] The words are not so plain, however, as to preclude consideration of the policy of the statute and appraisal of underlying considerations in the light of what is known about the Congressional intent. There is rather general agreement that, despite the narrow limitation upon disclosure which the language imports, the privilege is not confined to voluntary disclosure but extends to subpoenas or other legal process directed to census employees. The literal reading places heavy stress upon the word "furnished" and makes confidential only papers physically in the possession of the Census Bureau. In this view the privilege does not apply to the original form after it has been filled out but before it is mailed. It would not apply to the original form if it were returned to the company to be corrected and sent back to the Census Bureau. These last propositions are

[10] The reason for the rule was stated in *Samish* v. *Superior Court*, 28 Cal. App. 2d 685, 695, 83 P. 2d 305, 310: "Since the protection against privileged communications often leads to a suppression of the truth and to a defeat of justice, the tendency of the courts is toward a strict construction of such statutes."

manifestly at war with the underlying purpose of Section 9 and therefore suggest that the literal reading proves too much. For if the original report either before it is mailed or while it is back in the hands of the company for correction comes under Section 9, a copy prepared and retained at the request and for the use of the Census Bureau whenever the Bureau should call, can also be brought within the idea of "furnished" without doing violence to the word. Surely the words are not so plain, if the policy of the Act points to a broader view, as to require the Court to deny the privilege, saying "We see what you are driving at, but you have not said it, and therefore we shall go on before." *Johnson* v. *United States*, 163 Fed. 30, 32.

Before analyzing the statute further, however, with a view to discerning its policy, it will be helpful to state somewhat more fully the opposing interests that demand recognition.

THE INTEREST IN SECRECY

Accurate and current statistics measuring social and economic conditions in the United States are extremely important not only to many private businesses but in the formulation of legislative and executive policies. Public support for the program and the willingness of individual firms to cooperate in promptly furnishing data, including candid estimates, uninhibited by the fear of adverse use, depends upon assurances that their secrecy will be preserved. The high priority which Congress gives both the program and the need for secrecy is evident from census legislation.

The retained copies have an important place in the census of manufactures. Business records are kept for many purposes, but the need for providing precise, prompt, and accurate replies to inquiries from the Bureau of the Census may be assigned little priority by a company in determining how its records are to be kept. In such cases, the immediate answer to such inquiries is that the records do not provide the desired information or that final compilations will not be available until some time in the future. An analyst of the Bureau who is familiar with the particular industry then undertakes to work out, with his opposite number in the reporting company, an estimate based on information in the records as kept. Experience has shown that the technician of the Bureau of the Census, because of his knowledge of the industry under consideration, may question some estimates as unrealistic and request consideration of other factors before an estimate is agreed upon. In like manner he may doubt, and therefore wish to verify, particular returns. The process of compiling the necessary statistics for even a single company often involves close and continuous collaboration between company technicians and Census Bureau experts. The importance of consultation is enhanced when new company employees are assigned to its census reports or a question arises about the strict comparability of the reports of several firms.

The retained copies are the focal point of these discussions between the Bureau of the Census and reporting firms. This is true not only of a current census but also of a subsequent census and of in-

termediate surveys which may be undertaken. In light of the aim for current data and statistics the importance of a readily available reference is apparent. Keeping a copy in the hands of the company reporting is more important to the Bureau of the Census, probably, than to the company. It is for these reasons that the Census Bureau requests that the copy be retained by the reporting companies, and intends that its promise of confidential treatment cover the copy as well as the original.

It is difficult to form a precise, impartial judgment concerning the effect upon the Census Bureau of holding that retained copies of census reports are subject to legal process to the same extent as any other papers in a company's files. The original reports would remain confidential. Although we agree that "[n]o threat of punishment or penalty can substitute for the cooperation now obtained through confidentiality,"[11] it seems probable that any reporting firms which feared the consequences of disclosure would stop keeping copies rather than refuse to cooperate. The copies are highly important to the census. There is no other vehicle for immediate consultation, and the substitutes also entail trouble and expense. Thus, the critical question is whether the want of the privilege would lead a significant number of business firms to refuse to keep copies of their census reports.

There are those who sincerely believe that the copies would still be kept. The habit of keeping copies of

[11] Memorandum for the Secretary of Commerce in *Federal Trade Commission* v. *Dilger*, No. 375, October Term, 1960, p. 6.

everything in business files is exceedingly strong. The reports are often useful to the companies themselves, and they often turn them over to the Federal Trade Commission voluntarily instead of preparing new data in answer to its requests (as did the petitioner at an earlier stage in this case—*supra*, pp. 16–17). Comparatively few firms are worried about some possible future investigation under the antitrust laws or fear disclosure under proper safeguards in judicial proceedings. Despite these influences the Department of Commerce, the Census Bureau and the Bureau of the Budget are firmly convinced by their knowledge of the business community and experience in other countries that an effective pledge of confidentiality is absolutely essential to the preservation of the present practice of using, for the purposes of consultation, file copies of census reports. Their judgment is to some degree confirmed by the fact that the dominant concerns in any industrial classification, whose data are therefore most important in the census, are also the firms most likely to take account of the regulatory consequences of disclosure.

THE INTEREST IN DISCLOSURE

There is obviously a broad public interest in having all pertinent and reliable evidence available in administrative and judicial proceedings. Census data is often crucially important in antitrust litigation. Data defining the market and revealing its structure and other characteristics may be necessary in most antitrust cases, and may be decisive under the standards announced by this Court in such cases as *Standard Oil Co.* v. *United States*, 337 U.S. 293; *United*

States v. *duPont*, 353 U.S. 586; *Tampa Electric Co.* v. *Nashville Coal Co.*, 365 U.S. 320. Evidence showing the shares of different firms in the relevant market is essential to resolution of Clayton Act, Section 7, cases and Federal Trade Commission Act anti-merger cases. Frequently the only data in existence which afford a reliably informative comparison between one company's activities, on the one hand, and the total activities of all such companies, on the other, are the Census Bureau's compilations (so-called "universe" figures), made in a census of manufactures, and the individual company's report submitted in the same census. For many industries no other pairs of figures exist which are predicated upon the same definitions, areas, products, periods of time, etc.—all essential if comparison of the figures is to be meaningful. Since such alternative compilations as are available in company files are rarely prepared upon the same basis as, and hence are not comparable with, the "universe" figures, reconstruction of comparable compilations from basic records may be either impossible or prohibitively time-consuming and expensive, or both.

In addition to 29 anti-merger cases in present litigation, the Commission now examines about 1,000 mergers a year and formally investigates over 100 mergers a year; as of June 30, 1961, 102 such investigations were in progress. For many years the Commission, like the Antitrust Division of the Department of Justice, has obtained and used retained copies of reports to the Census Bureau in making preliminary evaluations of mergers and in merger

litigation. A number of companies have voluntarily obtained from the Bureau copies of reports which they had not retained, for submission to the Commission in lieu of less convenient production.

The interest served by making retained copies of census reports available in antitrust proceedings is not confined to the government. Companies under investigation may be equally concerned to investigate the reliability of universe figures or to verify comparisons. In the litigation involving the proposed merger between the Bethlehem and Youngstown steel companies it was Bethlehem which unsuccessfully sought copies of other companies' census reports. *United States* v. *Bethlehem Steel Corp.*, 21 F.R.D. 568 (S.D. N.Y.).

Yet it is undoubtedly the agencies charged with enforcement that feel the greatest concern. They are the moving parties. Effective enforcement requires prompt action. Much but not all the information obtainable through retained copies of census reports could ultimately be elicited by interrogatories, discovery and like processes of inquiry into the underlying records in ordinary business files. Unfortunately these are slow and tedious proceedings. Census information fulfills two functions. Its prime use is to give the government a quick initial appraisal of the relative positions of companies in the pertinent market and thus enable the government to gauge, in a general way, the likely impact of corporate acquisitions and mergers and to select appropriate fields for further antitrust investigation and proceedings. Census information is also used, along with other

evidence, in proof of formal charges of violation of the antitrust laws. The ready availability of such information at an early stage is important, if not crucial, to effective antitrust enforcement. Permitting firms to withhold such documents, and instead to prepare answers to the identical questions, would place a premium upon the dilatory evasive tactics followed by petitioner.

THE POLICY OF THE CENSUS ACT

It has been suggested that the purpose of Section 9 of the Census Act, like the purpose of the corresponding provisions of the Internal Revenue Act, is to impose a duty of non-disclosure upon federal employees in order "to prevent wholesale revelation of confidential information to persons not determined to have a legitimate interest therein." *Tollefsen* v. *Phillips,* 16 F.R.D. 348, 349 (D. Mass.); *Currier* v. *Allied New Hampshire Gas Co.,* 101 N.H. 205, 206–207, 137 A. 2d 405, 407. The evil is said to be "wholesale" disclosure by the government—the indiscriminate use of information submitted for limited purposes, without the knowledge of the person concerned and adversely to his interests. If such revelations were not halted, it would be unfair and self-defeating for the census system to be employed as an instrument for the gathering of facts which persons subject to the census would otherwise keep secret. When the data become pertinent in an authorized administrative, judicial or legislative inquiry, it is said, a new factor is introduced, for there is then a clear public interest in having such

proceedings decided on the basis of the best possible evidence. The disclosure would usually come from a party's own records with full opportunity for explanation. It would be limited to specific papers relevant to a legitimate inquiry, and there would be judicial safeguards against irrelevant questions and indiscriminate publication. At the point where these factors become relevant, it is concluded, the policy of Section 9 breaks off.

This is obviously an intelligent (although debatable) view of what the public policy in this area should be; and it might well express the judgment of Congress articulated in Section 9. It would seem, however, that the policy of Section 9 is actually broader. Subdivision (1) indicates that the aim is to confine the use of census data to general statistical purposes. This limitation would be violated by admitting the data as evidence in litigation or a regulatory proceeding. The language specifically forbidding any officer or employee from using the information furnished under the Census Act "for any purpose other than the statistical purposes for which it is supplied" was introduced by Section 25 of the Act of July 2, 1909, 36 Stat. 9. Previous census legislation had simply prohibited communication to unauthorized persons. When the new words were added, they were said to give "a more effective guaranty than heretofore of the confidential character of the returns as needed in many cases and desirable in all to enlist that public confidence without which census inquiries must fail." H. Rep. No. 960, 60th Cong., 1st Sess., p. 23. Subdivision 3, which came into the

statute at the same time, forbids the Bureau to permit anyone other than the sworn officers and employees of the Bureau to examine individual reports. One who was concerned only with loose broadcasting or leaks to competitors or other unauthorized private individuals would not have written these broad prohibitions.

Thus, the true underlying policy of Section 9 appears to embrace these additional objectives: (a) to remove any opposition to the census based upon the notion that it is unfair for the government to require information for allegedly statistical purposes and then to use it adversely to the one who has made the report, and (b) to encourage business firms and others subject to the census voluntarily to cooperate in the development of accurate statistics and to give completely candid answers, including uninhibited estimates upon matters not subject to absolute proof, without the circumspection and delay stimulated by awareness that returns may be subject to judicial or regulatory scrutiny.

This view was expressed in a proclamation dealing with the census of population, not with the census of manufactures, issued by the President of the United States on November 22, 1929, 46 Stat. 3011—

> The sole purpose of the Census is to secure general statistical information regarding the population and resources of the country * * *. No person can be harmed in any way by furnishing the information required. The Census has nothing to do with taxation * * * or with the enforcement of any national, state, or local law or ordinance. * * *

It may be argued that to extend a privilege of secrecy to data maintained or reports submitted without the compulsion of law would create an unreasonable risk that the Department of Commerce or Census Bureau might so broaden the privilege as to impair the normal conduct of judicial proceedings and hamper the work of regulatory agencies. That question, however, is not presented here, for the reports in question were compulsory. Whatever danger there may be in the case of voluntary reports (as to which we express no opinion), it cannot arise in the case of copies of required reports. If, when the question arises, the danger seems real, the privilege applicable to copies could, if necessary, be confined to the kinds of reports prescribed by law. The privilege would then be coextensive in subject matter with the scope of the legal compulsion to report and thus effectively confined to the kinds of information which Congress made confidential. There is no danger of unwarranted extension to different subjects in holding that required reports and copies of required reports kept for the Census Bureau are privileged even though they are in the possession of the reporting firm. We would think it plain, therefore, that the policy of Section 9 (as we interpret it) extended to any copies of compulsory census reports retained in a company's files solely for the convenience of the Census Bureau.

The difficulty in the question presented in this case arises from the fact that many concerns would keep their copies for their own convenience even though the Census Bureau did not request their retention.

Where the report was kept solely for the company's own use without serving any statistical purpose of the government, there would be no reason to accord it a privileged status. As pointed out at page 34 above, this is the rule with respect to a taxpayer's copies of income tax returns. In this situation any other rule would seem unduly to curtail the rights of investigatory agencies like the Federal Trade Commission.

Thus the decision upon whether the policy of Section 9 extends to retained copies of required census reports seems to depend upon one's appraisal of the reasons for their retention, not subjectively in the individual case, but, since a uniform rule must be laid down, generally for all reporting firms. The true explanation probably varies from company to company over a broad spectrum ranging from companies which keep the copies solely to accommodate the Census Bureau, through those who have mixed motives, to those who would undoubtedly keep copies for their private use. One can only guess at the distribution in the range.

In these circumstances the Solicitor General believes that the legend upon the census report and file copy should be conclusive. The United States has requested the retention of the file copy for its purposes. The United States has given assurances of confidentiality which were in-recipients, to apply to the copy as well as the original. See pages 47–48 below. It would have been more complicated in form, but scarcely different in substance, for the Census Bureau to have worked out a system of duplicate originals, one of which was

mailed to the Bureau and the other of which was retained as an official government document by the company acting as the government's agent. Compare *Shapiro* v. *United States,* 335 U.S. 1. Having requested retention for its purposes, the United States should not later assert that the copy would have been kept without the government's request. And in such matters the United States should be treated as one government, with all its agencies bound by the same rule.

The Federal Trade Commission argued in the *Dilger* case,[12] and would press upon the Court here, the conclusion that the legend on the census form does not assert that the retained copies are privileged against disclosure when material to legal or administrative proceedings. The statement that the report is "confidential," accessible only to "sworn Census employees" and not for "purposes of taxation, investigation or regulation" is only a paraphrasing of the statute. The reference to access by census employees, the Commission believes, gives any company fair warning that the statement applies only to Census Bureau files, not to the firm's private records, which are not examined by census employees and access to which is not controlled by the Census Bureau. The fact that the legend appears on the duplicate as well as the original can fairly be attributed to the desire to make it an exact duplicate and therefore does not necessarily suggest any independent assertion that the duplicate is privileged. The weakness in this argument is that the Census Bureau and Department of

[12] The Antitrust Division also presented this argument in the courts below. See R. 228.

Commerce, which are the authors of the forms and legend, interpret them as pledging secrecy for the copies; and these branches of the government inform us that they have consistently assured companies that this is their meaning. The response of the Federal Trade Commission and Antitrust Division is that, even if theirs is not a correct interpretation of the form, the Census Bureau has no power to extend the statutory privilege and the United States is not estopped by the unauthorized and mistaken misrepresentations of the officials of a single agency. Cf. *Federal Crop Insurance Corp.* v. *Merrill,* 332 U.S. 380, 384; *United States* v. *California,* 332 U.S. 19, 39–40.

Although the harsh rule barring estoppel of the government by the unauthorized acts of its officials may often be necessary to protect the public interest, it is doubtful whether it should extend to obtaining copies of documents which might not even exist but for reliance upon the official representation. In private law a principal is not bound by a transaction negotiated through the unauthorized representations of an agent acting outside the scope of his actual and apparent authority but, if the principal wishes to take the benefits of the transaction, he cannot also disavow the representations. Restatement of Agency 2d, A.L.I., Sec. 98. And by a parity of reasoning it might be said that if the government wishes to take advantage of documents created at the request of one of its departments, the government cannot disavow the accompanying representation.

But the point need not be decided. Here the nub of the matter is that the copies were retained at the request of the Census Bureau for its statistical purposes. The request was authorized; and it is the request, not the assurances of confidentiality, that brings the copies within the policy of the Act. See pp. 42–47 above. If there were doubt, the assurances would be entitled to weight as the interpretation put upon the Census Act by the department principally charged with its administration. *Norwegian Nitrogen Co.* v. *United States*, 288 U.S. 294, 315.

It is the opinion of the Solicitor General, therefore, that although there are strong arguments for either interpretation, the balance favors the construction which accords the statutory privilege to copies of compulsory census reports which are kept at the request of the Census Bureau for its statistical purposes. It should be emphasized, however, that the privilege does not reach other data in a company's files nor justify a refusal to furnish information upon the subjects covered by the reports, provided that disclosure of the reports *per se* is not required.

II

THE STATUTORY PENALTY WAS PROPERLY ASSESSED AGAINST PETITIONER FOR ITS FAILURE TO FILE THE SPECIAL REPORTS REQUIRED BY THE COMMISSION

Section 6(b) of the Federal Trade Commission Act (*infra*, p. 72) authorizes the Commission to require corporations engaged in commerce to file with the Commission, in such form as it may prescribe, "annual or special * * * reports or answers in writing to specific questions, furnishing to the commission such

information as it may require as to the organization, business, conduct, practices, management, and relation to other corporations, partnerships, and individuals * * *." Section 10 of the Act (*infra*, p. 74) provides that if any corporation "required * * * to file any annual or special report shall fail so to do * * * [it] shall forfeit to the United States the sum of $100 for each and every day of the continuance of such failure," such forfeiture to be recoverable in a civil suit by the United States.

The Commission, as part of a formal investigation instituted under Section 7 of the Clayton Act, ordered petitioner (and seven corporations which petitioner had recently acquired) to file nine special reports relating to these and other corporate acquisitions.[11] The orders directing the filing of the special reports specified in detail the information to be submitted, broken down into topics and sub-topics. In addition, petitioner was directed to submit designated

[11] The Commission issued its orders for special reports only after protracted and unsuccessful attempts to obtain the information voluntarily from petitioner. See the extensive correspondence between the Commission and petitioner set forth at pages 114–162 of the record. As the Commission stated in the district court (R. 266), this was the first time that the Commission was required to resort to such orders prior to the filing of a complaint. "[T]he use of the process of 6(b) has never before been necessary because of voluntary disclosures. Since 1950 over 400 alleged violations of Section 7 have been investigated and because of the full or substantial compliance with the requests of the Commission on a voluntary basis, there has never been a need for the use of either an order under Section 6(b) or a subpoena under Section 9 of the F.T.C. Act. In the continuing investigation of defendant, however, the Commission has felt it necessary to use both types of process."

documents, including copies of census reports. The nine orders for special reports called for the submission of 358 separate items of information or documentary material.

Prior to the filing of the action for penalties, petitioner had answered 52 (15 percent) of the items (see page 90, *infra*). The district court held that another 43 of them (12 percent) were "so indefinite as to be unenforceable" (R. 211). There were also 21 demands (6 percent) for copies of census reports, which may have been privileged but as to which the privilege had been waived (see Point I, *supra*). Thus, as of the time the action was filed, there were 95 items which were either invalid or with which petitioner had complied (116 items, if the census privilege was not waived). Petitioner was in default as to the remaining 263 items (or 242, if the census privilege was not waived), approximately two-thirds of the questions. See Appendix D, p. 91, black and shaded portions of chart.

In its post-trial memorandums in the district court, petitioner answered an additional 33 questions (9 percent). It also purported to answer 72 other questions (20 percent) by referring to documents which it had previously submitted, but without having indicated their pertinence to the specific inquiries posed by the Commission. While we think it clear that such post-trial answers cannot be included in determining the extent of petitioner's compliance prior to default, even if they are counted, petitioner was still in default on 137 items, or more than 38 percent. Indeed, even petitioner's own calculations, which include only the two orders directed to it and exclude the seven others

directed to its subsidiaries, show that petitioner had defaulted on 37 percent of all the questions and on 41 percent of the enforceable ones (Pet. Br. 3b, 4b).[14]

We submit that the court of appeals correctly held that petitioner, by such substantial non-compliance with the Commission's orders, incurred the statutory penalty for failure to submit special reports required by the Commission.

A. *Petitioner was Properly Subjected to Penalties for its Substantial Non-Compliance with the Commission's Orders.*

1. As the court of appeals pointed out (R. 229–230), this is not "a case involving a single oversight or an honest mistake in a good-faith attempt to comply with the Commission's order * * *. The facts before us suggest no such mitigating circumstances. The respondents cannot claim that theirs was merely an honest omission since they refused to accede to many of the Commission's requests for documents and information on the sole ground that the Commission had no authority to demand what was requested"—a contention that both the district court (R. 206–207) and the court of appeals (R. 224–227) correctly rejected.[14a] See *United States* v. *Morton Salt Co.*, 338 U.S. 632. Indeed, petitioner itself stated, in its brief in the district court (p. 42):

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[14] There is set forth in Appendix C, *infra*, pp. 80–90, a table showing, as to each of the 358 items in the nine Commission orders, petitioner's compliance or non-compliance, the time of compliance, and the district court's ruling. A graph summarizing this table is set forth in Appendix D, *infra*, p. 91.

[14a] Certiorari was denied on this issue (compare R. 237 with petition for certiorari, p. 3).

"Admittedly, most of the questions were reasonably straightforward and were capable of being answered."[14b]

The case, then, is one in which a litigant's failure to comply with an order results not from any honest mistake of judgment as to what is required, or from excusable error in a good faith attempt to comply, but from the decision to contest the authority of the tribunal. If that claim is rejected, however—as it was in this case—then the litigant incurs whatever penalty the law imposes for non-compliance. One who refuses to do what "the law requires * * * acts at his peril, in the sense that he must be held to the acceptance of any lawful consequences attached to the refusal" (*Life & Casualty Insurance Co.* v. *McCray*, 291 U.S. 566, 574).

The Act imposes a civil penalty upon any corporation "required * * * to file any * * * special report [which] fail[s] so to do." Petitioner itself admits that it never complied with at least one-third of the valid items called for in the reports, and the record shows that, when the time for compliance expired, petitioner had not complied with two-thirds of the items.[15] Petitioner never contended that it could not

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[14b] A copy of that brief has been lodged with the clerk of this Court.

[15] Petitioner refers to the district court's "refusal to enforce" 63 percent of the questions (Br. 9), states that "only 37% were held to be enforceable" (Br. 7), and makes similar statements throughout its brief (Br. 11, 18, 20). These statements are misleading to the extent they suggest that the district court held that 63 percent of the questions were invalid, and only 37 percent were valid. The district court actually held that only 43 questions, constituting only 12 percent of the total, were unenforceable (R. 211). The remaining 51 percent were not enforced not because they were invalid, but because petitioner had already answered them—a small

comply, and never sought additional time for compliance. It never attempted to seek immediate judicial review of the Commission's orders directing the submission of the special reports, although it could have done so (see *infra*, pp. 58–64). It merely complied with a small part of the orders, and then attempted to justify its non-compliance with the other parts by challenging their validity when called to account. In such circumstances, petitioner's non-compliance with a substantial portion of the orders directing the submission of special reports constituted a failure to file the reports within the meaning of the Act, and petitioner therefore is liable for the statutory penalties.

Bowman Dairy Co. v. *United States*, 341 U.S. 214, upon which petitioner relies (Br. 17–18), does not support its claim that the partial invalidity of the Commission's orders barred the assessment of the statutory penalties. In *Bowman Dairy*, a criminal antitrust case, the trial court enforced a *subpoena duces tecum*, obtained by the defendants, which directed the government to produce material it had obtained, "in any manner other than by seizure or process," during (1) a grand jury investigation and (2) preparation for trial. The government moved to quash, but the motion was denied. Acting under instructions from the Attorney General, the government attorney who had the material "respectfully declined to comply with the court's order," chiefly on the ground (also urged in the motion to quash) that a criminal

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part prior to default, and the remainder during the proceedings in the district court (R. 211; see *supra*, p. 51).

defendant's pre-trial discovery is limited by Rule 16 of the Federal Rules of Criminal Procedure to material obtained "by seizure or process." See the opinion of the court of appeals, 185 F. 2d 159, 161–162 (C.A. 7), and 341 U.S. at 218. The district court held the attorney in contempt and ordered him imprisoned until compliance with the subpoena, but the court of appeals reversed. 185 F. 2d 159. This Court held (p. 221) that the materials were subject to subpoena; it further held, however, that the last clause of the subpoena was invalid because it was so vague that it was "not intended to produce evidentiary materials but is merely a fishing expedition to see what may turn up." The Court then stated (*ibid.*):

> One should not be held in contempt under a subpoena that is part good and part bad. The burden is on the court to see that the subpoena is good in its entirety and it is not upon the person who faces punishment to cull the good from the bad.

The facts in *Bowman Dairy* were significantly different from those in the present case, and the broad language must be read in the light of the case then before the Court. *First*, in *Bowman* the government had exhausted all of its remedies when it moved to quash the subpoena; the order denying its motion was interlocutory and not appealable; and the only way in which the government could preserve its position was by declining to comply and then litigating the issue on appeal from a citation for contempt. In the present case, however, petitioner had an alternative remedy for testing the validity of the Commission's orders; it could promptly have instituted an appropri-

ate action in the district court (see *infra*, pp. 58–64). *Second*, in *Bowman*, the government attorney was forced to make the choice between obeying the court's order and thereby disobeying the order of his superior, the Attorney General, or obeying the order of the Attorney General and thereby disobeying the order of the court. Petitioner was not compelled to choose between conflicting obligations. *Third*, the considerations applicable to a contempt case, which involves loss of personal liberty by imprisonment for flouting of judicial authority, are different from those governing proceedings to collect statutory penalties from a corporation which fails to comply with its duty to file special reports with the Federal Trade Commission.

2. The district court, upon holding that portions of the orders were invalid, rejected petitioner's contention that it was required to strike down the entire set (R. 210). The court stated (*ibid.*) that, "[f]rom a practical point of view, this seems silly since it would require the Commission to redraw and reissue the same orders." The court concluded (*ibid.*) that "ordering partial compliance is a more practical method of dealing with these orders," and that Section 6(c) of the Administrative Procedure Act (5 U.S.C. 1005(c)) authorized such action. That section directs a court, in a proceeding challenging an agency subpoena, to sustain "any such subpoena *or similar process or demand* to the extent that it is found to be in accordance with law * * *" (emphasis added). The district court's action was plainly valid. See *National Labor Relations Board* v. *Anchor Rome Mills*, 197 F. 2d 447, 449 (C.A. 5).

Petitioner has abandoned its contention that the district court had no authority itself to direct compliance with the valid parts of the orders. It now argues (Br. 14–20) that the district court, by itself directing partial compliance with the orders, treated them as subpoenas; and that the legislative history of the Administrative Procedure Act shows that the only penalties Congress intended to impose for violation of administrative subpoenas were for contempt—penalties which accrue only after a litigant has had an opportunity to contest in court the validity of the subpoena. From these premises petitioner concludes that the statutory penalties are not applicable where the Commission's orders for special reports are held partially invalid.

This argument rests upon a confusion between the mechanics for enforcing part of a Commission order requiring special reports and the liability of a corporation for penalties for failure to submit such reports.[16] The various requests for information were severable. The small number held invalid were not so interrelated to, or dependent upon, the remaining requests as to make new orders out of the command to file reports. When the district court directed petitioner to comply with portions of the orders, it did not substitute its own order for the orders of the Commission. The court merely lent its authority to compel necessary obedience with the Commission's orders, as Section 9 of the Federal Trade Commission Act

[16] It also mistakenly assumes that petitioner could not have judicially challenged the orders prior to the penalty proceedings. See *infra*, pp. 58–64.

(*infra*, p. 72a) authorizes it to do. Petitioner incurred the penalties when it failed to file the reports ordered by the Commission, and neither the extent nor the method of subsequent judicial enforcement of the orders affected its liability therefor.

Nor is there any merit to petitioner's contention (Br. 22) that the court of appeals, instead of itself deciding that penalties were incurred, should have remanded the case to the district court to decide that question. The district court had held (R. 212) that since the orders were "partially defective," the government had no right to penalties. The court of appeals reversed that ruling, however, holding that petitioner's "wrong guess on a disputed issue of law does not prevent it from being held to 'lawful consequences attached to the refusal'" (R. 230). Since the court of appeals held that petitioner had incurred penalties, and since the statute sets the amount of such penalties at $100 a day for each day on default, there was no question remaining open on which a remand was necessary.

B. *Petitioner Could Have Timely Challenged the Commission's Orders by Instituting an Action in the District Court.*

1. Petitioner, relying on *Federal Trade Commission* v. *Claire Furnace Co.*, 274 U.S. 160, argues (Br. 36–40) that it could not directly review the Commission's orders for special reports, but could challenge them only by way of defense to the suit for penalties, and that the imposition of penalties in such circum-

stances deprives it of its "liberty and property" without due process of law (Br. 36, 39). The court of appeals stated (R. 231) that the statutory procedure might not meet "established standards of due process" "[i]f judicial review were in fact limited to enforcement proceedings instituted by the Commission, and a daily forfeiture were collected for a failure to comply." It held (R. 231–232), however, that, prior to the institution of the government's suit for penalties, petitioner might have brought an action in the district court, under either the Declaratory Judgment Act or Section 10(e) of the Administrative Procedure Act, "to test the validity of an administrative agency's demand for a special annual report, when daily penalties may be assessed for failure to comply with any valid request," and that *Claire Furnace* did not bar such direct judicial review.

In the *Claire Furnace* case the Commission had ordered certain companies to file monthly reports under Section 6 of the Act, giving production costs, balance sheets and extensive corporate information. The reports were ordered in connection with a Congressional inquiry into the high costs of living, and there was no charge that any of the companies were violating the statutes which the Commission administered. The companies brought an equity action to enjoin the Commission from enforcing its orders, alleging that the agency had no authority to obtain the information for such purpose. The lower courts granted an injunction, but this Court reversed. It

stated 274 U.S. at 173–174) that "[t]here was nothing which the Commission could have done to secure enforcement of the challenged orders except to request the Attorney General to institute proceedings for a mandamus or supply him with the necessary facts for an action to enforce the incurred forfeitures"; that the companies would not be injured unless he instituted such a proceeding; and that, if he did so, the companies "would have been fully heard and could have adequately and effectively presented every ground of objection sought to be presented now" and would "have full opportunity to contest the legality of any prejudicial proceeding against them. That right being adequate, they were not in a position to ask relief by injunction. The bill should have been dismissed for want of equity."

Petitioner's reliance on *Claire Furnace* is self-defeating. For if that decision stands as a bar to direct injunctive or declaratory relief, then it necessarily also stands for the proposition that the opportunity to litigate the issue in the government's subsequent enforcement suit is an "adequate" "right" that satisfies due process. Conversely, if such subsequent opportunity to litigate is not an adequate opportunity to test the Commission's order, then the basis of the decision in *Claire Furnace* is no longer valid.

In any event, the court of appeals correctly held that *Claire Furnace* did not preclude direct judicial review of the Commission's orders in this case. The opinion in *Claire Furnace* considered the adequacy of the remedy in the subsequent government suit only in terms of a suit for mandamus; it did not discuss

the question whether the accrual of daily penalties for non-compliance would justify direct judicial review of an order for special reports. In *United States* v. *Morton Salt Co.*, 338 U.S. 632, this Court, in upholding the power of the Commission to require special reports showing how a corporation had complied with a court of appeals' order enforcing a Commission order under Section 5 of the Act, strongly intimated that direct review could be obtained to avoid accrual of penalties. It stated (p. 654):

> It is argued that if we sustain this use of § 6, the power will be unconfined and its arbitrary exercise subject to no judicial review or control, unless and until the Government brings suit, as here, for penalties. The Government, it is said, may delay such action while ruinous penalties accumulate and defendant runs the risk that his defenses will not be sustained. However, we are not prepared to say that courts would be powerless if after an effort to clarify or modify such an order it still is considered to be so arbitrary as to be unlawful and the Government pursues a policy of accumulating penalties while avoiding a judicial test by refusing to bring action to recover them. Since we do not think this record presents the question, we do not undertake to determine whether the Declaratory Judgment Act, the Administrative Procedure Act, or general equitable powers of the courts would afford a remedy if there were shown to be a wrong, or what the consequences would be if no chance is given for a test of reasonable objections to such an order. Cf. *Oklahoma Operating Co.* v. *Love*, 252 U.S. 331. It is enough to say that, in up-

> holding this order upon this record, we are not to be understood as holding such orders exempt from judicial examination or as extending a license to exact as reports what would not reasonably be comprehended within that term as used by Congress in the context of this Act.

The Declaratory Judgment Act and the Administrative Procedure Act, both of which were enacted after the decision in *Claire Furance*, permit direct review of a Commission order for special reports—particularly if the absence of such review might raise serious constitutional questions about the order. The broad language of the Declaratory Judgment Act (28 U.S.C. 2201), authorizing any court of the United States to "declare the rights and other legal relations of any interested party seeking such declaration," covers an action for a declaration of the validity of a Commission order under Section 6(b). See *Public Service Commission* v. *Wycoff Co.*, 344 U.S. 237, 241; *Eccles* v. *Peoples Bank*, 333 U.S. 426, 434; and the discussion of this issue by the court of appeals in this case, R. 231–232. Similarly, Section 10(e) of the Administrative Procedure Act (5 U.S.C. 1009(e)) sanctions review of such an order. It subjects to judicial review "[e]very agency action made reviewable by statute and every final agency action for which there is no other adequate remedy in any court * * *." As the court of appeals pointed out (R. 232), while the Commission's order may not be a "final disposition" within the statutory definition of "order" in Section 2(d) of the Administrative Procedure Act (5 U.S.C. 1001(d)), it carries a "sanction" under 2(f)

(5 U.S.C. 1001(f)); and Section 2(g)(5 U.S.C. 1001 (g)) defines "agency action" as including the whole or part of "every agency * * * sanction * * *." Moreover, in view of the penal aspects of the statutory forfeitures, "the traditional use of equity proceedings to enjoin criminal proceedings" (*Switchmen's Union* v. *National Mediation Board*, 320 U.S. 297, 306) might also justify the district court in prohibiting the institution of penalty proceedings for violation of orders it finds to be invalid.

In any event, since petitioner made no attempt to seek direct judicial review of the Commission's orders, it cannot now be heard to argue that, if it had done so, the court would not have entertained the suit. Cf. *United States* v. *Tucker Truck Lines*, 344 U.S. 33, 37. Petitioner had ample time within which to institute such action. The first set of six Commission orders, calling for the filing of special reports within 30 days, was issued on January 9, 1959 (R. 9–41). As a result of petitioner's filing of a motion to vacate (R. 164–167), which the Commission denied (R. 170), the time for compliance was extended to May 28, 1959 (R. 170). The three reports called for by the second set of orders, issued on June 8, 1959, were due on July 8, 1959 (R. 44–53). The notices of default on the first set of orders were issued on June 18, 1959, three weeks after default occurred on May 28, 1959 (R. 53–55, 175–187); and the notices of default on the second set were issued on July 22, 1959, two weeks after default thereon (R. 56–58, 188–191).

Thus, six months elapsed between the issuance of the first orders and the notices of default on the last. Petitioner could have instituted an action to challenge the orders at any time during that period. Had it done so, it could also have sought a stay pending the determination of their validity. See 5 U.S.C. 1009(d). And, in view of the clear intimation in the *Morton Salt* case, *supra*, that such an action would lie, petitioner cannot claim that it refrained from seeking such relief because of its belief that *Claire Furnace* stood in the way.[17]

2. Alternatively, petitioner argues (Br. 39–40) that if *Claire Furnace* did not bar it from seeking judicial review of the Commission's orders, then both the court of appeals and this Court should have postponed the effective date of those orders pending the completion of judicial review, including the proceed-

[17] Petitioner states (Br. 39–40) that the Commission discouraged it from instituting such an action. The contention is based on the fact that, in response to a letter from petitioner asking whether members of the Commission would submit to the jurisdiction of the District Court for the Southern District of New York in a suit for declaratory judgment and injunctive relief (R. 197), the Commission's general counsel replied that, if such a suit were filed, the Commission "would be compelled to note the probable lack of jurisdiction in the Court upon the authority of" the *Claire Furnace* case (R. 200).

Petitioner's letter, however, was not sent until August 31, 1959, after the notices of default had been issued. The filing of an action at that time would hardly have been a timely challenge to the Commission's orders. Moreover, the fact that the Commission believed that *Claire Furnace* "probably" barred such a suit did not excuse petitioner from bringing it and litigating the question.

ings in this Court.[18] Since acceptance of this argument would mean that, even though this Court agrees with the court of appeals that petitioner incurred penalties, they would not begin to accrue until after this Court's decision, petitioner is really arguing that, since it secured delay by omitting to bring suit, the Commission's suit for penalties should be treated as if it were the suit which petitioner omitted. Obviously this is only a complex way of saying that penalties for serious non-compliance should not begin to run until the validity of the order has been litigated by a suit for penalties. The arguments we have previously made to show that penalties were properly assessed also compel the rejection of this form of the argument. See also *United States* v. *Clyde S. S. Co.*, 36 F. 2d 691, 694 (C.A. 2).

C. *The Orders Called for the Filing of "Special Reports", Even Though Such Reports Required Answers to Specific Questions.*

Section 6(b) of the Act authorizes the Commission to require the filing of "annual or special * * * reports or answers in writing to specific questions, furnishing to the commission such information as it may require as to" various business practices. Section 10 imposes forfeitures upon any corporation that fails to file any required "annual or special report". Petitioner argues (Br. 23–27) that since the reports it was ordered to file called for answers to specific

[18] In its order granting certiorari (limited to certain questions), this Court stayed the further accumulation of forfeitures from February 7, 1961, the date on which the petition was filed (R. 238). The order further stated (*ibid.*) that "[p]etitioner's liability for forfeitures accruing prior to February 7, 1961, is to abide the event of this litigation."

questions, they ceased to be "special reports" within the meaning of Section 6(b); and that a corporation that fails to furnish "answers * * * to specific questions" is not liable for penalties, but is subject only to a proceeding to compel it to answer.

But a "special report" does not cease to be such merely because the Commission specifies particular information to be supplied and calls for answers to specific questions. Each of the orders directed the filing of a "special report" (R. 9, 23, 27, 30, 34, 38, 44, 46, 49–50) and, in addition to the specific questions asked, also required the submission of designated documents. The orders plainly called for "special reports" as that term is used in Section 6(b). Any order for a special report must detail with specificity what information is required, in order to enable the recipient to understand what it must furnish. The House Committee Report on the Act, speaking of what became Section 6(b), stated (H. Rep. No. 533, 63d Cong., 2d Sess., p. 4): "The commission, under this section, may also require such special reports as it may deem advisable. By this means, if the ordinary data furnished by a corporation in its annual reports does not adequately disclose its organization, financial condition, business practices, or relation to other corporations, there can be obtained by a special report such additional information as the commission may deem necessary." But the only way in which the Commission can insure that the special report will provide "such additional information as [it] may deem necessary" is by asking for the specific information

required. The simplest—and best—method for obtaining that information is by asking specific questions.

There is no basis for petitioner's contention that Congress intended to draw such a distinction between special reports and answers to specific questions, and that it intended the statutory penalties to apply only to the former, and not to the latter. On the contrary, both the legislative history of Section 6(b), and the general design of the statute, indicate that the phrase "answers in writing to specific questions" merely illustrates what the Commission may call for in a "special report". And, when Congress provided penalties in Section 10 for failure to file special reports, it also covered failure to answer the specific questions asked in an order to file special reports.

The present language in Section 6(b) was written by the House and Senate conferees. As passed by the Senate, the bill would have authorized the Commission (1) to require corporations " to furnish to the commission from time to time information, statements, and records concerning its organization, business, financial condition, conduct, practices, management, and relation to other corporations, or to individuals, associations, or partnerships" (Section 3(b)), and (2) to prescribe "a uniform system of annual reports * * * and * * * require such reports, *or any special report,* to be made under oath, or otherwise in the discretion of the commission" (Section 3(c), emphasis added). The bill included the present penalty of $100 a day for default in filing "any annual or special report" (Section 6). S. Rep. No. 597, 63d Cong., 2d

Sess., pp. 2–4. The earlier House bill had similar provisions, but would have *required* corporations of a certain size to file annual reports. H. Rep. No. 533, Pt. 3, 63d Cong., 2d Sess., pp. 13–15. In both bills, "special report" clearly was a catch-all phrase designed to enable the Commission to obtain "information, statements and records" that might not be included in annual reports.

The conference adopted the Senate approach of giving the Commission authority to require the submission of annual reports, rather than the House approach of providing in the bill for a mandatory filing. It added the phrase "answers in writing to specific questions" to the provision defining the scope of the Commission's authority to require special and annual reports, but left the penalty provision unchanged. The explanation of the conference report to the Congress, however, makes it clear that the grant of specific authority to the Commission to require answers to specific questions was not intended to make any change of substance in the Senate Bill, but was merely some clarifying "new phraseology." See 51 Cong. Rec. 14768, 14925–14926. The only distinction that Section 6(b) draws is between annual and special reports, and the Commission may require "answers in writing to specific questions" as part of either.

Petitioner's argument would lead to the anomalous result that penalties would be imposed only for

failure to file a response to a broad general inquiry, but not for failure to answer specific questions. The purpose of the $100-a-day forfeiture for non-submission of reports is to "furnish sufficient inducement to compliance with requests for information" (*United States* v. *Clyde S.S. Co.*, 36 F. 2d 691, 694 (C.A. 2)). Answers to specific questions may be far more useful and important to the Commission in the performance of its regulatory functions than responses to a general inquiry. Congress did not limit penalties to failure to respond to the latter inquires; it also penalized failure to answer specific questions.[19]

CONCLUSION

If this Court holds that petitioner waived any claim that the retained copies of the census reports are privileged, the judgment of the court of appeals should be affirmed in its entirety. If this court holds that the claim of privilege has not been waived, the judgement of the district court should be modified to eliminate the direction that petitioner comply with those provisions of the orders directing the submission of retained copies of census reports and, as thus

[19] To the extent that *United States* v. *National Biscuit Co.*, 25 F. Supp. 329 (S.D.N.Y.), is contrary to this view, we believe it to be erroneous. Indeed, the court of appeals stated in the present case that "it is by no means certain that we would have agreed with the district court's disposition of that case had it been appealed" (R. 230).

modified, the judgment of the court of appeals should be affirmed.

Respectfully submitted.

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Solicitor General.
LEE LOEVINGER,
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Assistant to the Solicitor General.
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Attorneys.

OCTOBER 1961.

APPENDIX A

I. The Census Act

Section 9, 13 U.S.C. 9: Information as confidential; exception.

(a) Neither the Secretary, nor any other officer or employee of the Department of Commerce or bureau or agency thereof, may, except as provided in section 8 of this title—

(1) use the information furnished under the provisions of this title for any purpose other than the statistical purposes for which it is supplied; or

(2) make any publication whereby the data furnished by any particular establishment or individual under this title can be identified; or

(3) permit anyone other than the sworn officers and employees of the Department or bureau or agency thereof to examine the individual reports.

(b) The provisions of subsection (a) of this section relating to the confidential treatment of data for particular individuals and establishments, shall not apply to the censuses of governments provided for by subchapter III of chapter 5 of this title, nor to interim current data provided for by subchapter IV of chapter 5 of this title as to the subjects covered by censuses of governments, with respect to any information obtained therefor that is compiled from, or customarily provided in, public records.

SECTION 132, 13 U.S.C. 132: CONTROLLING LAW; EFFECT ON OTHER AGENCIES.

To the extent that the provisions of this subchapter IV of this chapter conflict with any other provision of this title or other law, pertaining to the Secretary or the Department of Commerce, the provisions of this title shall control; but nothing in this title shall be deemed to revoke or impair the authority of any other Federal agency with respect to the collection or release of information.

II. THE FEDERAL TRADE COMMISSION ACT, 38 STAT. 717

SECTION 6, 15 U.S.C. 46: ADDITIONAL POWERS OF COMMISSION.

The commission shall also have power—

(a) *Investigation of corporations.*

To gather and compile information concerning, and to investigate from time to time the organization, business, conduct, practices, and management of any corporation engaged in commerce, excepting banks and common carriers subject to the Act to regulate commerce, and its relation to other corporations and to individuals, associations, and partnerships. .

(b) *Reports by corporations.*

To require, by general or special orders, corporations engaged in commerce, excepting banks and common carriers subject to the Act to regulate commerce, or any class of them, or any of them, respectively, to file with the commission in such form as the commission may prescribe annual or special, or both annual and special, reports or answers in writing to specific questions, fur-

nishing to the commission such information as it may require as to the organization, business, conduct, practices, management, and relation to other corporations, partnerships, and individuals of the respective corporations filing such reports or answers in writing. Such reports and answers shall be made under oath, or otherwise, as the commission may prescribe, and shall be filed with the commission within such reasonable period as the commission may prescribe, unless additional time be granted in any case by the commission.

* * * * *

SECTION 9, 15 U.S.C. 49: DOCUMENTARY EVIDENCE; DEPOSITIONS; WITNESSES.

For the purposes of sections 41–46 and 47–58 of this title the commission, or its duly authorized agent or agents, shall at all reasonable times have access to, for the purpose of examination, and the right to copy any documentary evidence of any corporation being investigated or proceeded against; and the commission shall have power to require by subpoena the attendance and testimony of witnesses and the production of all such documentary evidence relating to any matter under investigation. Any member of the commission may sign subpoenas, and members and examiners of the commission may administer oaths and affirmations, examine witnesses, and receive evidence.

Such attendance of witnesses, and the production of such documentary evidence, may be required from any place in the United States, at any designated place of hearing. And in case of disobedience to a

subpoena the commission may invoke the aid of any court of the United States in requiring the attendance and testimony of witnesses and the production of documentary evidence.

Any of the district courts of the United States within the jurisdiction of which such inquiry is carried on may, in case of contumacy or refusal to obey a subpoena issued to any corporation or other person, issue an order requiring such corporation or other person to appear before the commission, or to produce documentary evidence if so ordered, or to give evidence touching the matter in question; and any failure to obey such order of the court may be punished by such court as a contempt thereof.

Upon the application of the Attorney General of the United States, at the request of the commission, the district courts of the United States shall have jurisdiction to issue writs of mandamus commanding any person or corporation to comply with the provisions of sections 41–46 and 47–58 of this title or any order of the commission made in pursuance thereof.

The commission may order testimony to be taken by deposition in any proceeding or investigation pending under said sections at any stage of such proceeding or investigation. Such depositions may be taken before any person designated by the commission and having power to administer oaths. Such testimony shall be reduced to writing by the person taking the deposition, or under his direction, and shall then be subscribed by the deponent. Any person may be com-

pelled to appear and depose and to produce documentary evidence in the same manner as witnesses may be compelled to appear and testify and produce documentary evidence before the commission as hereinbefore provided.

Witnesses summoned before the commission shall be paid the same fees and mileage that are paid witnesses in the courts of the United States, and witnesses whose depositions are taken and the persons taking the same shall severally be entitled to the same fees as are paid for like services in the courts of the United States.

No person shall be excused from attending and testifying or from producing documentary evidence before the commission or in obedience to the subpoena of the commission on the ground or for the reason that the testimony or evidence, documentary or otherwise, required of him may tend to criminate him or subject him to a penalty or forfeiture. But no natural person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he may testify, or produce evidence, documentary or otherwise, before the commission in obedience to a subpoena issued by it: *Provided,* That no natural person so testifying shall be exempt from prosecution and punishment for perjury committed in so testifying.

SECTION 10, 15 U.S.C. 50: OFFENSES AND PENALTIES.

Any person who shall neglect or refuse to attend and testify, or to answer any lawful inquiry or to produce documentary evidence, if in his power to do so, in obedience to the subpoena or lawful requirement of the commission, shall be guilty of an offense and upon conviction thereof by a court of competent ju-

risdiction shall be punished by a fine of not less than $1,000 nor more than $5,000, or by imprisonment for not more than one year, or by both such fine and imprisonment.

Any person who shall willfully make, or cause to be made, any false entry or statement of fact in any report required to be made under sections 41–46 and 47–58 of this title, or who shall willfully make, or cause to be made, any false entry in any account, record, or memorandum kept by any corporation subject to said sections, or who shall willfully neglect or fail to make, or to cause to be made, full, true, and correct entries in such accounts, records, or memoranda of all facts and transactions appertaining to the business of such corporation, or who shall willfully remove out of the jurisdiction of the United States, or willfully mutilate, alter, or by any other means falsify any documentary evidence of such corporation, or who shall willfully refuse to submit to the commission or to any of its authorized agents, for the purpose of inspection and taking copies, any documentary evidence of such corporation in his possession or within his control, shall be deemed guilty of an offense against the United States, and shall be subject, upon conviction in any court of the United States of competent jurisdiction, to a fine of not less than $1,000 nor more than $5,000, or to imprisonment for a term of not more than three years, or to both such fine and imprisonment.

If any corporation required by sections 41–46 and 47–58 of this title to file any annual or special report shall fail so to do within the time fixed by the commission for filing the same and such failure shall continue for thirty days after notice of such default, the corporation shall forfeit to the United States the sum of $100 for each and every day of the continuance of

such failure, which forfeiture shall be payable into the Treasury of the United States, and shall be recoverable in a civil suit in the name of the United States brought in the district where the corporation has its principal office or in any district in which it shall do business. It shall be the duty of the various United States attorneys, under the direction of the Attorney General of the United States, to prosecute for the recovery of forfeitures. The costs and expenses of such prosecution shall be paid out of the appropriation for the expenses of the courts of the United States.

Any officer or employee of the commission who shall make public any information obtained by the commission without its authority, unless directed by a court, shall be deemed guilty of a misdemeanor, and, upon conviction thereof, shall be punished by a fine not exceeding $5,000, or by imprisonment not exceeding one year, or by fine and imprisonment, in the discretion of the court.

III. The Administrative Procedure Act, 60 Stat. 237

Section 6(c), 5 U.S.C. 1005(c): Subpoenas and production of evidence.

Agency subpoenas authorized by law shall be issued to any party upon request and, as may be required by rules of procedure, upon a statement or showing of general relevance and reasonable scope of the evidence sought. Upon contest the court shall sustain any such subpoena or similar process or demand to the extent that it is found to be in accordance with law and, in any proceeding for enforcement, shall issue an order requiring the appearance of the witness or the production of the evidence or data within a rea-

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sonable time under penalty of punishment for contempt in case of contumacious failure to comply.

SECTION 10, 5 U.S.C. 1009: JUDICIAL REVIEW OF AGENCY ACTION.

Except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion—

(a) *Right of review.*

Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof.

(b) *Form and venue of proceedings.*

The form of proceeding for judicial review shall be any special statutory review proceeding relevant to the subject matter in any court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action (including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus) in any court of competent jurisdiction. Agency action shall be subject to judicial review in civil or criminal proceedings for judicial enforcement except to the extent that prior, adequate, and exclusive opportunity for such review is provided by law.

(c) *Acts reviewable.*

Every agency action made reviewable by statute and every final agency action for which there is no other adequate remedy in any court shall be subject to judicial review. Any preliminary, procedural, or intermediate agency action or ruling not directly reviewable shall be subject to review

upon the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final shall be final for the purposes of this subsection whether or not there has been presented or determined any application for a declaratory order, for any form of reconsideration, or (unless the agency otherwise requires by rule and provides that the action meanwhile shall be inoperative) for an appeal to superior agency authority.

(d) *Relief pending review.*

Pending judicial review any agency is authorized, where it finds that justice so requires, to postpone the effective date of any action taken by it. Upon such conditions as may be required and to the extent necessary to prevent irreparable injury, every reviewing court (including every court to which a case may be taken on appeal from or upon application for certiorari or other writ to a reviewing court) is authorized to issue all necessary and appropriate process to postpone the effective date of any agency action or to preserve status or rights pending conclusion of the review proceedings.

(e) *Scope of review.*

So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall (A) compel agency unlawfully withheld or unreasonably delayed; and (B) hold unlawful and set aside agency action, findings, and conclu-

sions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; (5) unsupported by substantial evidence in any case subject to the requirements of sections 1006 and 1007 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or (6) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court. In making the foregoing determinations the court shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error.

IV. THE DECLATORY JUDGMENT ACT, 28 U.S.C. 2201: CREATION OF REMEDY.

In a case of actual controversy within its jurisdiction, except with respect to Federal taxes, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

DUPLICATE

Form M-26A

U. S. DEPARTMENT OF COMMERCE
BUREAU OF THE CENSUS

1958 CENSUS OF MANUFACTURES

PULP, PAPER, AND BOARD

CONFIDENTIAL.—This report is required by Act of Congress, approved August 31, 1954 (13 U.S.C. 131 and 224). Your report is confidential and only sworn Census employees will have access to it. It cannot be used for purposes of taxation, investigation or regulation.

MC-26A (2601)

CENSUS USE ONLY

Location

0-1 0-2

KEEP THIS COPY FOR YOUR FILES

PLEASE READ ENCLOSED INSTRUCTIONS BEFORE COMPLETING REPORT

Please complete and return this form in the return envelope to the Bureau of the Census, Jeffersonville, Indiana, **not later than 30 days** after you receive it.

ITEM 1A NAME OF ESTABLISHMENT

NAME

(In answering item 1B, parts (1) through (5) below, be sure your answers relate to the ACTUAL PHYSICAL LOCATION of your establishment, which may be different from its mailing address.)

ITEM 1B LOCATION OF ESTABLISHMENT

1. STATE 2. COUNTY

3. Is this establishment within the legal boundary of a municipality? Yes ☐ No ☐

If Yes,
(a) Enter name of the municipality (Enter name only if establishment is within legal boundary)

(b) Type of municipality (Check applicable box)
☐ City ☐ Village ☐ Borough
☐ Other (Specify)

4. STREET AND NUMBER OF ESTABLISHMENT'S LOCATION (If establishment's location cannot be described by street and number, give name and number of any of road or highway and not known information to locate establishment, e.g., R. 35, 3 miles South of Clarksville)

For establishments in the States of Maine, New Hampshire, Vermont, Massachusetts, Rhode Island, Connecticut, New York, New Jersey, and Pennsylvania

5. Is this establishment within a town or township? Yes ☐ No ☐

If YES, [illegible] NAME OF TOWN OR TOWNSHIP

ITEM 2A FEDERAL SOCIAL SECURITY EMPLOYER IDENTIFICATION NUMBER

(Please correct any er...)

Federal Social Security Employer Identification Number of this establishment (Item 10 of Employer's Quarterly Tax Report, Treasury Form 941)

[illegible] Enter all 9 digits

ITEM 2B COMPANY ORGANIZATION

a. Does this company operate more than one place of business under the same Employer Identification Number (Item 10 of Employer's Quarterly Tax Report, Treasury Form 941)? Yes ☐ No ☐

b. Does this company own or control another company? Yes ☐ No ☐

c. Is this company owned or controlled by another company? Yes ☐ No ☐
If Yes, (a) checked in Part (c), give name and address of owning or controlling company

ITEM 2C FORM OF OWNERSHIP

Check one

(1) ☐ Individual proprietor
(2) ☐ Partnership (Specify number of working partners ____)
(3) ☐ Corporation (Do not include any form of coop. ass'n.)
8 ☐ Cooperative association (corporate or noncorporate)
(9) ☐ Other (Specify)

DEFINITIONS FOR ITEMS 3, 4, AND 5

Production Workers.—Workers (up through the working foreman level) engaged in fabricating, processing, assembling, inspection, receiving, storage, handling, packing, warehousing, shipping (but not delivering), maintenance, repair, janitorial, watchman services, product development, auxiliary production for plant's own use (e.g., power plant), record keeping, and other services closely associated with these production operations. Exclude supervisory employees above working foreman level.

All Other Employees.—Nonproduction personnel at this establishment, including those engaged in the following activities: factory supervision (above working foreman level), sales (including driver salesmen), sales delivery (highway truck drivers and their helpers), advertising, credit, collection, installation and servicing of own products, clerical and routine office functions, executive, purchasing, finance, legal, personnel (including cafeteria, medical, etc.), professional and technical. **Include** force account construction employees on your payroll engaged in construction of major additions or alterations to the plant who are utilized as a separate work force. Workers engaged in regular maintenance and repair operations should be included with production workers.

ITEM 3 PAYROLLS ($000)

Enter the total of wages, salaries, bonuses, commissions and other remunerations in 1958, before deductions, paid to—

	1958 Thousands of dollars	KEY
a. Production workers	$	0-5
b. All other employees	$	0-6
c. **Total payrolls** (Sum of a and b)	$	0-7

ITEM 4 NUMBER OF EMPLOYEES

Production workers during pay period ended nearest 15th of—

See definitions above Item 3

	Number of employees	
a. March 1958		0-8
b. May 1958		0-9
c. August 1958		0-10
d. November 1958		1 1-1

LOCATION OF ESTABLISHMENT

3. Is this establishment within the legal boundaries of a municipality? Yes ☐ No ☐

If Yes,

(a) Enter name of the municipality. Enter name only if establishment is within legal boundaries.

(b) Type of municipality. Check applicable box.

☐ City ☐ Village ☐ Borough

☐ Other (Specify)

4. STREET AND NUMBER OF ESTABLISHMENT (Location of main entrance should be described by street and number, e.g. name and number of road or highway, distance from intersection of nearest established streets, e.g. 2 mi. E. of town hall on State Route 10)

For establishments in New England, New Jersey and Pennsylvania

5. Is this establishment within a town or township? Yes ☐ No ☐

If YES, ENTER NAME OF TOWN OR TOWNSHIP

COMPANY ORGANIZATION

[illegible] Yes ☐ No ☐

[illegible] Yes ☐ No ☐

[illegible] Yes ☐ No ☐

ITEM 2

FORM OF OWNERSHIP

1 ☐ Individual proprietorship

4 ☐ Partnership. Specify number of working partners

0 ☐ Corporation. Do not include any form of cooperative

8 ☐ Cooperative association. Incorporated or unincorporated

9 ☐ Other. Specify

DEFINITIONS FOR ITEMS 3, 4, AND 5

Production Workers. — Workers up through the working foreman level engaged in fabricating, processing, assembling, inspection, receiving, storage, handling, packing, warehousing, shipping (but not delivering), maintenance, repair, janitorial, watchman services, product development, auxiliary production for plant's own use (e.g., power plant), record keeping, and other services closely associated with these production operations. Exclude supervisory employees above working foreman level.

All Other Employees. — Nonproduction personnel at this establishment, including those engaged in the following activities: factory supervision above working foreman level; sales (including driver salesmen), sales delivery, highway truck drivers and their helpers; advertising; credit; collection; installation and servicing of own products; clerical and routine office functions; executive; purchasing; finance; legal; personnel (including cafeteria, medical, etc.); professional and technical. **Include** force account construction employees on your payroll engaged in construction of major additions or alterations to the plant who are utilized as a separate work force. Workers engaged in regular maintenance and repair operations should be included with production workers.

ITEM 3 PAYROLLS ($000)

Enter the total of wages, salaries, bonuses, commissions, and other remunerations in 1958, before deductions, paid to—

		1958 Thousands of dollars	
a.	Production workers	$	0-5
b.	All other employees	$	0-6
c.	**Total payrolls** (Sum of a and b)	$	0-7

ITEM 4 NUMBER OF EMPLOYEES

		Number of employees	
	Production workers during pay period ended nearest 15th of— (See definitions above for 1)		
a.	March 1958		0-8
b.	May 1958		0-9
c.	August 1958		0-10
d.	November 1958		1-1
e.	Sum of items b, c, and d		1-2
f.	Average number. Divide sum on line e by 4		1-3
	All other employees during pay period ended nearest (See definitions above for 1)		
g.	All other employees, March 15, 1958		1-4
h.	**Total.** Sum of f and g		1-5

ITEM 5 PLANT MAN-HOURS OF PRODUCTION WORKERS BY QUARTER (Thousands)

Enter the total number of plant man-hours of production workers as defined above for each calendar quarter of comparable 13 weeks period of 1958. Do not include hours on paid vacations, holidays or sick leave.

		Thousands of hours	
a.	January through March 1958		1-6
b.	April through June 1958		1-7
c.	July through September 1958		1-8
d.	October through December 1958		1-9
e.	**Total production worker man-hours** (Sum of a, b, c, and d)		1-10

OVER

ORIGINAL Return this copy to Bureau of the Census

Form approved. Budget Bureau No. 41-S810.

Form MC-26A

U. S. DEPARTMENT OF COMMERCE
BUREAU OF THE CENSUS

1958 CENSUS OF MANUFACTURES

PULP, PAPER, AND BOARD

CONFIDENTIAL. — This report is required by Act of Congress, approved August 31, 1954 (13 U.S.C. 131 and 224). Your report is confidential and only sworn Census employees will have access to it. It cannot be used for purposes of taxation, investigation or regulation.

In correspondence pertaining to this report please refer to this file number _____

(Please correct any errors in name and address)

0		Location	
0-1		0-2	

PLEASE READ ENCLOSED INSTRUCTIONS BEFORE COMPLETING REPORT.

Please complete and return this form in the return envelope to the Bureau of the Census, Jeffersonville, Indiana, not later than 30 days after you receive it.

ITEM 1A NAME OF ESTABLISHMENT — Name

ITEM 2A FEDERAL SOCIAL SECURITY EMPLOYER IDENTIFICATION NUMBER — Federal Social Security Employer Identification Number of this establishment (Item 10 of Employer's Quarterly Tax Report, Treasury Form 941)

Give all 9 digits

ITEM 1B LOCATION OF ESTABLISHMENT

In answering Item 1B, parts (1) through (5) below, be sure your answers relate to the ACTUAL PHYSICAL LOCATION of your establishment, which may be different from its mailing address.

a. State | b. County

3. Is this establishment within the legal boundary of a municipality? Yes ☐ No ☐

If "Yes,"

(a) Enter name of the municipality. (Enter name only if establishment is within legal boundary)

(b) Type of municipality. (Check applicable box)
☐ City ☐ Village ☐ Borough
☐ Other (Specify) _____

4. STREET AND NUMBER OF ESTABLISHMENT LOCATION. If establishment cannot be described by street and number, give name and number of entry, if any, of road or highway, and full known information to locate establishment, e.g., R. No. 3, 3 miles South of Clarksville.

5. Is this establishment within a town or township? Yes ☐ No ☐

If "Yes," Enter name of town or township

ITEM 2B COMPANY ORGANIZATION

a. Does this company operate more than one place of business under the same Employer Identification Number (Item 10 of Employer's Quarterly Tax Report, Treasury Form 941)? Yes ☐ No ☐

b. Does this company own or control another company? Yes ☐ No ☐

c. Is this company owned or controlled by another company? Yes ☐ No ☐

If "Yes," is checked in Part (c), give name and address of owning or controlling company.

ITEM 3. FORM OF OWNERSHIP — Check one.

(1) ☐ Individual proprietor
(2) ☐ Partnership (Specify number of working partners _____)
(3) ☐ Corporation (Do not include any form of coop. assn.)
(4) ☐ Cooperative association (corporate or nonprofit)
(9) ☐ Other (Specify) _____

DEFINITIONS FOR ITEMS 3, 4, AND 5

Production Workers. — Workers (up through the working foreman level) engaged in fabricating, processing, assembling, inspection, receiving, storage, handling, packing, warehousing, shipping (but not delivering), maintenance, repair, janitorial, watchman services, product development, auxiliary production for plant's own use (e.g., power plant), record keeping, and other services closely associated with these production operations. Exclude supervisory employees above working foreman level.

All Other Employees. — Nonproduction personnel of this establishment, including those engaged in the following activities: factory supervision above working foreman level, sales (including driver salesmen), sales delivery (highway truck drivers and their helpers), advertising, credit, collection, installation and servicing of own products, clerical and routine office functions, executive, purchasing, finance, legal, personnel (including cafeteria, medical, etc.), professional and technical. Include force account construction employees on your payroll engaged in construction of minor additions or alterations to the plant who are utilized as a separate work force. Workers engaged in regular maintenance and repair operations should be included with production workers.

ITEM 5 PAYROLLS (1958)

Enter the total of wages, salaries, bonuses, commissions, and other remunerations in 1958, before deductions, paid to—

	1958 Thousands of dollars	KEY
a. Production workers	$	0-5
b. All other employees	$	0-6
c. **Total payrolls** (Sum of a and b)	$	0-7

ITEM 4 NUMBER OF EMPLOYEES

Production workers during pay period ended nearest 15th of—

	Number of employees	
a. March 1958		0-8
b. May 1958		0-9
c. August 1958		0-10

ESTABLISHMENT

8. Is this establishment within the legal boundaries of a municipality? Yes ☐ No ☐

If Yes,

(a) Enter name of the municipality. (Enter name only if establishment is within legal boundary.)

(b) Type of municipality. (Check applicable box.)
☐ City ☐ Village ☐ Borough
☐ Other. Specify:

9. Is this establishment within a town or township? Yes ☐ No ☐

If Yes, enter name of town or township.

COMPANY ORGANIZATION

Does this company operate more than one place of business under the same Employer Identification Number (Item 10 of Employer's Quarterly Tax Report Treasury Form 941)? Yes ☐ No ☐

Is this company owned or controlled by another company? Yes ☐ No ☐

If Yes, enter name and address of owning or controlling company.

ITEM X FORM OF OWNERSHIP

Check one.

1 ☐ Individual proprietor
2 ☐ Partnership (Specify number of working partners)
3 ☐ Corporation (Do not include any form of coop. assn.)
8 ☐ Cooperative association (corporate or noncorporate)
9 ☐ Other. Specify:

DEFINITIONS FOR ITEMS 3, 4, AND 5

Production Workers.—Workers up through the working foreman level engaged in fabricating, processing, assembling, inspection, receiving, storage, handling, packing, warehousing, shipping (but not delivering), maintenance, repair, janitorial, watchman services, product development, auxiliary production for plant's own use (e.g., power plant), record keeping, and other services closely associated with these production operations. Exclude supervisory employees above working foreman level.

All Other Employees.—Nonproduction personnel of this establishment, including those engaged in the following activities: factory supervision above working foreman level; sales (including driver salesmen), sales delivery, highway truck drivers and their helpers; advertising; credit; collection; installation and servicing of own products; clerical and routine office functions; executive; purchasing; finance; legal; personnel (including cafeteria, medical, etc.); professional and technical. **Include** force account construction employees on your payroll engaged in construction of major additions or alterations to the plant who are utilized as a separate work force. Workers engaged in regular maintenance and repair operations should be included with production workers.

ITEM 3 PAYROLL DATA

Enter the total of wages, salaries, bonuses, commissions, and other remunerations in 1958, before deductions, paid to—

	1958 Thousands of dollars	
a. Production workers	$	3-a
b. All other employees	$	3-b
c. Total payrolls (Sum of a and b)	$	3-c

ITEM 4 EMPLOYMENT DATA

	Number of employees	
Production workers during pay period ended nearest 15th of— (See definitions above Item 3.) a. March 1958		4-a
b. May 1958		4-b
c. August 1958		4-c
d. November 1958		4-d
e. Sum of items a, b, c, and d		4-e
f. Average number (Divide sum on line e by 4)		4-f
All other employees during pay period ended nearest (See definitions above Item 3) g. All other employees, March 15, 1958		4-g
h. Total (Sum of f and g)		4-h

ITEM 5 PRODUCTION WORKER MAN-HOURS

Enter the total number of plant man-hours of production workers (as defined above) for each calendar quarter (or comparable 13-week period) of 1958. Do not include hours for paid vacations, holidays or sick leave.

	Thousands of hours	
a. January through March 1958		5-a
b. April through June 1958		5-b
c. July through September 1958		5-c
d. October through December 1958		5-d
e. Total production worker man-hours (Sum of a, b, c, and d)		5-e

(OVER)

APPENDIX C

Tabulation of the contents of the nine orders in terms of compliance, enforceability, and enforcement as determined by district court and affirmed by court of appeals

1	2	3	4	5	6	7
	NO DEFAULT		DEFAULT ON ITEMS HELD VALID BELOW			
				Enforcement unnecessary because answered in petitioner's post-trial memorandum [1]		
Order, Paragraph	Adequate predefault compliance.	No compliance. Order held improperly broad. Enforcement denied by district court.	Enforcement necessary and granted by district court	Answers furnished in memorandum	Answers furnished in memorandum by reference to documents previously submitted	Census data involved (included also under col. 4).
Order 1:						
1(a)					X	
1(b)	X					
1(c)			X			
1(d)	X					
1(e)			X			X
1(f)			X			X
1(g)			X			
1(h)		X				
1(i)			X			X
2(a)			X			
2(b)					X	
2(c)			X			
2(d)				X		
2(e)				X		
3(a)	X					
3(b)			X			
3(c)	X					
3(d)			X			
3(e)(1)	X					
3(e)(2)	X					
3(e)(3)					X	
3(f)			X			
3(g)(1)					X	
3(g)(2)					X	
3(h)(1)					X	
3(h)(2)			X			
3(i)			X			
3(j)		X				

[1] ***Defendant's Comments on Specifications of Default***, submitted by St. Regis in response to the Government's post-trial memorandum required by the district court. These documents are lodged with the Court.

Tabulation of the contents of the nine orders in terms of compliance, enforceability, and enforcement as determined by district court and affirmed by court of appeals—Continued

1	2	3	4	5	6	7
	NO DEFAULT		DEFAULT ON ITEMS HELD VALID BELOW			
				Enforcement unnecessary because answered in petitioner's post-trial memorandum		
Order, Paragraph	Adequate predefault compliance.	No compliance. Order held improperly broad. Enforcement denied by district court.	Enforcement necessary and granted by district court	Answers furnished in memorandum	Answers furnished in memorandum by reference to documents previously submitted	Census data involved (included also under col. 4).
Order 1—Continued						
3(k)		X				
5(a)[3]			X			
5(b)			X			
5(c)			X			
5(d)	X					
5(e)(1)	X					
5(e)(2)	X					
5(f)			X			
5(g)					X	
5(h)			X			
5(i)			X			
5(j)		X				
5(k)		X				
6(a)			X			
6(b)			X			
6(c)			X			
6(d)			X			
6(e)			X			
6(f)			X			
6(g)	X					
6(h)			X			
6(i)			X			
6(j)		X				
6(k)				X		
7(a)			X			
7(b)			X			
7(c)			X			
7(d)			X			
7(e)			X			
7(f)			X			
7(g)			X			
7(h)			X			
7(i)	X					
7(j)		X				
7(k)	X					
8(a)			X			

[3] There is no ¶ 4 in order 1.

***Tabulation of the contents of the nine orders in terms of compliance, enforceability, and enforcement as determined by district court and affirmed by court of appeals*—Continued**

1	2	3	4	5	6	7
	NO DEFAULT		DEFAULT ON ITEMS HELD VALID BELOW			
				Enforcement unnecessary because answered in petitioner's post-trial memorandum		
Order, Paragraph	Adequate predefault compliance.	No compliance. Order held improperly broad. Enforcement denied by district court.	Enforcement necessary and granted by district court	Answers furnished in memorandum	Answers furnished in memorandum by reference to documents previously submitted	Census data involved (included also under col. 4).
Order 1—Continued						
8(b)			X			
8(c)	X					
8(d)			X			
8(a)(1)			X			
8(e)(2)	X					
8(e)(3)			X			
8(f)			X			
8(g)(1)					X	
8(g)(2)					X	
8(g)(3)					X	
8(h)(1)			X			
8(h)(2)			X			
8(i)			X			
8(j)		X				
8(k)	X					
9(a)	X					
9(b)			X			
9(c)					X	
9(d)	X					
9(e)(1)	X					
[illegible]					X	
[illegible](3)	X					
[illegible]					X	
[illegible]	X					
[illegible]			X			
[illegible]					X	
[illegible]d)	X					
10(e)(1)					X	
10(e)(2)					X	
10(e)(3)	X					
10(f)					X	
11(a)		X				
11(b)		X				
11(c)		X				
11(d)		X				
11(e)		X				

***Tabulation of the contents of the nine orders in terms of compliance, enforceability, and enforcement as determined by district court and affirmed by court of appeals*—Continued**

1	2	3	4	5	6	7
	NO DEFAULT		DEFAULT ON ITEMS HELD VALID BELOW			
				Enforcement unnecessary because answered in petitioner's post-trial memorandum		
Order, Paragraph	Adequate predefault compliance.	No compliance. Order held improperly broad. Enforcement denied by district court.	Enforcement necessary and granted by district court	Answers furnished in memorandum	Answers furnished in memorandum by reference to documents previously submitted	Census data involved (included also under col. 4).
Order 1—Continued						
11(f)		X				
11(g)		X				
11(h)		X				
11(i)		X				
11(j)		X				
11(k)		X				
11(l)		X				
12(a)				X		
12(b)				X		
12(c)				X		
12(d)				X		
13(a)				X		
13(b)(1)				X		
13(b)(2)				X		
14(a)(1)				X		
14(a)(2)				X		
14(a)(3)				X		
14(a)(4)				X		
14(a)(5)				X		
14(a)(6)				X		
14(a)(7)				X		
14(b)(1)				X		
14(b)(2)				X		
14(b)(3)				X		
14(b)(4)				X		
14(b)(5)				X		
14(b)(6)				X		
14(b)(7)				X		
14(c)(1)				X		
14(c)(2)				X		
14(c)(3)				X		
15(a)				X		
15(b)				X		
Subtotals 139	22	20	45	29	17	3

***Tabulation of the contents of the nine orders in terms of compliance, enforceability, and enforcement as determined by district court and affirmed by court of appeals*—Continued**

1	2	3	4	5	6	7
	NO DEFAULT		DEFAULT ON ITEMS HELD VALID BELOW			
				Enforcement unnecessary because answered in petitioner's post-trial memorandum		
Order, Paragraph	Adequate predefault compliance.	No compliance. Order held improperly broad. Enforcement denied by district court.	Enforcement necessary and granted by district court	Answers furnished in memorandum	Answers furnished in memorandum by reference to documents previously submitted	Census data involved (included also under col. 4).
Order 2:						
1	X					
2(a)					X	
2(b)			X			
2(c)					X	
2(d)			X			
2(e)					X	
2(f)(1)				X		
2(f)(2)				X		
2(f)(3)				X		
3(a)			X			X
3(b)			X			
3(c)		X				
3(d)			X			X
4(a)	X					
4(b)			X			
4(c)			X			
4(d)	X					
4(e)	X					
5(a)(1)					X	
5(a)(2)					X	
5(a)(3)					X	
5(b)(1)			X			
5(b)(2)			X			
6(a)(1)			X			
6(a)(2)			X			
6(a)(3)			X			
6(a)(4)			X			
6(a)(5)			X			
6(a)(6)			X			
6(a)(7)			X			
6(b)			X			
6(c)(1)			X			
6(c)(2)			X			
6(c)(3)			X			
7(a)		X				
7(b)		X				
8		X				
Subtotals	37	4	4	20	3	6	2

***Tabulation of the contents of the nine orders in terms of compliance, enforceability, and enforcement as determined by district court and affirmed by court of appeals*—Continued**

1	2	3	4	5	6	7
	NO DEFAULT		DEFAULT ON ITEMS HELD VALID BELOW			
				Enforcement unnecessary because answered in petitioner's post-trial memorandum		
Order, Paragraph	Adequate predefault compliance.	No compliance. Order held improperly broad. Enforcement denied by district court.	Enforcement necessary and granted by district court	Answers furnished in memorandum	Answers furnished in memorandum by reference to documents previously submitted	Census data involved (included also under col. 4).
Order 3:						
1	X					
2(a)					X	
2(b)			X			
2(c)					X	
2(d)			X			
2(e)	X					
2(f)(1)					X	
2(f)(2)					X	
2(f)(3)					X	
3(a)			X			X
3(b)			X			
3(c)		X				
3(d)			X			X
4(a)	X					
4(b)					X	
4(c)	X					
4(d)	X					
5(a)					X	
5(b)					X	
5(c)			X			
5(d)			X			
5(e)			X			
6(a)(1)					X	
6(a)(2)					X	
6(a)(3)					X	
6(a)(4)					X	
6(a)(5)					X	
6(a)(6)					X	
6(a)(7)					X	
6(b)					X	
6(c)(1)					X	
6(c)(2)					X	
6(c)(3)			X			
7(a)		X				
7(b)		X				
8		X				
Subtotals 36	5	4	9	0	18	2

***Tabulation of the contents of the nine orders in terms of compliance, enforceability, and enforcement as determined by district court and affirmed by court of appeals*—Continued**

1	2	3	4	5	6	7
	NO DEFAULT		DEFAULT ON ITEMS HELD VALID BELOW			
Order, Paragraph	Adequate predefault compliance.	No compliance. Order held improperly broad. Enforcement denied by district court.	Enforcement necessary and granted by district court	Enforcement unnecessary because answered in petitioner's post-trial memorandum		Census data involved (included also under col. 4).
				Answers furnished in memorandum	Answers furnished in memorandum by reference to documents previously submitted	
Order 4:						
1					X	
2(a)	X					
2(b)			X			
2(c)	X					
2(d)					X	
2(e)					X	
3(a)			X			X
3(b)			X			
3(c)		X				
3(d)			X			X
4(a)			X			
4(b)			X			
4(c)			X			
4(d)			X			
4(e)			X			
4(f)			X			
5(a)	X					
5(b)(1)			X			
5(b)(2)			X			
5(c)			X			
6(a)		X				
6(b)		X				
7		X				
Subtotals 23	3	4	13	0	3	2
Order 5:						
1	X					
2(a)					X	
2(b)			X			
2(c)	X					
2(d)					X	
2(e)			X			
3(a)(1)			X			X
3(a)(2)			X			
3(b)			X			
3(c)		X				
3(d)			X			X

***Tabulation of the contents of the nine orders in terms of compliance, enforceability, and enforcement as determined by district court and affirmed by court of appeals*—Continued**

1	2	3	4	5	6	7
	NO DEFAULT		DEFAULT ON ITEMS HELD VALID BELOW			
				Enforcement unnecessary because answered in petitioner's post-trial memorandum		
Order, Paragraph	Adequate predefault compliance.	No compliance. Order held improperly broad. Enforcement denied by district court.	Enforcement necessary and granted by district court	Answers furnished in memorandum	Answers furnished in memorandum by reference to documents previously submitted	Census data involved (included also under col. 4).
Order 5—Continued						
4(a)(1)	X					
4(a)(2)	X					
4(a)(3)	X					
4(a)(4)	X					
4(a)(5)	X					
4(a)(6)	X					
4(a)(7)	X					
4(b)(1)					X	
4(b)(2)			X			
4(c)			X			
4(d)					X	
4(e)			X			
5(a)(1)			X			
5(a)(2)			X			
5(a)(3)			X			
5(a)(4)			X			
5(a)(5)			X			
5(a)(6)			X			
5(a)(7)			X			
5(a)(8)			X			
5(a)(9)			X			
5(a)(10)			X			
5(b)			X			
5(c)			X			
5(d)			X			
5(e)(1)					X	
5(e)(2)					X	
5(e)(3)					X	
5(f)			X			
5(g)					X	
6(a)		X				
6(b)		X				
7		X				
Subtotal 44	9	4	23	0	8	2
Order 6:						
1	X					
2(a)					X	
2(b)			X			

***Tabulation of the contents of the nine orders in terms of compliance, enforceability, and enforcement as determined by district court and affirmed by court of appeals*—Continued**

1	2	3	4	5	6	7
Order, Paragraph	NO DEFAULT		DEFAULT ON ITEMS HELD VALID BELOW			
	Adequate predefault compliance.	No compliance. Order held improperly broad. Enforcement denied by district court.	Enforcement necessary and granted by district court	Enforcement unnecessary because answered in petitioner's post-trial memorandum		Census data involved (included also under cpl. 4).
				Answers furnished in memorandum	Answers furnished in memorandum by reference to documents previously submitted	
Order 6—Continued						
2(c)			X			
2(d)(1)			X			
2(d)(2)			X			
2(d)(3)			X			
2(d)(4)			X			
2(d)(5)			X			
2(d)(6)			X			
2(e)			X			
2(f)	X					
2(g)					X	
3(a)			X			X
3(b)			X			
3(c)		X				
3(d)(1)			X			
3(d)(2)			X			X
4(a)					X	X
4(b)(1)					X	
4(b)(2)			X			
4(c)			X			
5(a)	X					
5(b)					X	
6		X				
Subtotal 25	3	2	15	0	5	3
Order 7						
1(a)			X			
1(b)					X	
1(c)			X			
1(d)	X					
2(a)			X			X
2(b)			X			X
3(a)			X			
3(b)			X			
3(c)			X			
4(a)			X			
4(b)			X			
4(c)					X	
5		X				
Subtotal 13	1	1	9	0	2	2

***Tabulation of the contents of the nine orders in terms of compliance, enforceability, and enforcement as determined by district court and affirmed by court of appeals*—Continued**

1	2	3	4	5	6	7
	NO DEFAULT		DEFAULT ON ITEMS HELD VALID BELOW			
Order, Paragraph	Adequate predefault compliance.	No compliance. Order held improperly broad. Enforcement denied by district court.	Enforcement necessary and granted by district court	Enforcement unnecessary because answered in petitioner's post-trial memorandum		Census data involved (included also under col. 4).
				Answers furnished in memorandum	Answers furnished in memorandum by reference to documents previously submitted	
Order 8:						
1	X					
2(a)					X	
2(b)			X			
2(c)					X	
2(d)				X		
2(e)					X	
2(f)(1)					X	
2(f)(2)					X	
2(f)(3)					X	
3(a)			X			X
3(b)			X			
3(c)		X				
3(d)			X			X
4(a)	X					
4(b)			X			
4(c)	X					
5(a)(1)					X	
5(a)(2)					X	
5(b)(1)					X	
5(b)(2)					X	
5(b)(3)					X	
5(b)(4)			X			
5(b)(5)			X			
6(a)			X			
6(b)			X			
7		X				
Subtotals 26	3	2	9	1	11	2

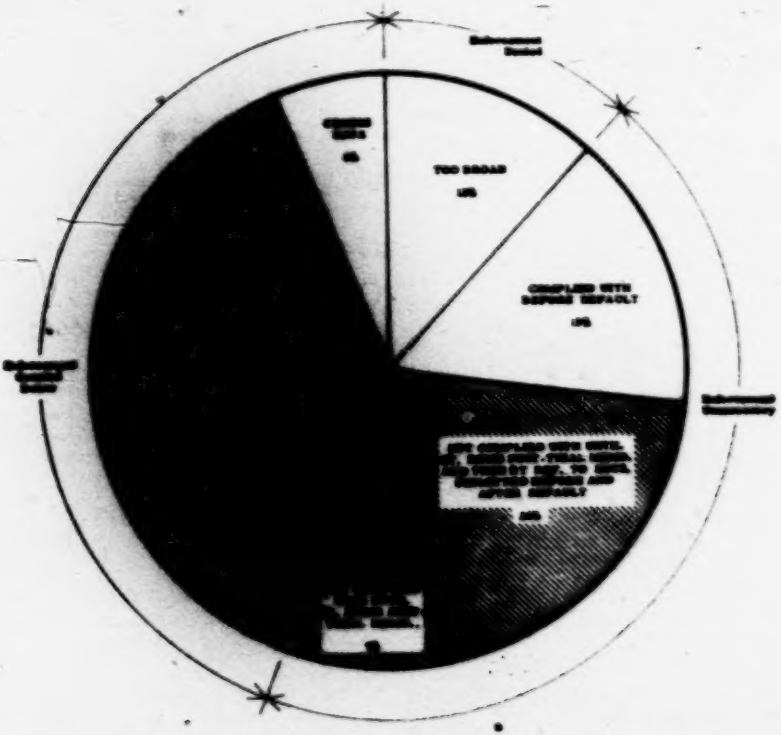
***Tabulation of the contents of the nine orders in terms of compliance, enforceability, and enforcement as determined by district court and affirmed by court of appeals*—Continued**

1	2	3	4	5	6	7
	NO DEFAULT		DEFAULT ON ITEMS HELD VALID BELOW			
Order, Paragraph	Adequate predefault compliance.	No compliance. Order held improperly broad. Enforcement denied by district court.	Enforcement necessary and granted by district court	Enforcement unnecessary because answered in petitioner's post-trial memorandum: Answers furnished in memorandum	Enforcement unnecessary because answered in petitioner's post-trial memorandum: Answers furnished in memorandum by reference to documents previously submitted	Census data involved (included also under col. 4).
Order 9:						
1			X			
2(a)			X			
2(b)			X			
2(c)			X			
2(d)			X			
2(e)					X	
3(a)			X			X
3(b)			X			
3(c)		X				
3(d)(1)			X			X
3(d)(2)			X			X
4(a)			X			
4(b)(1)	X					
4(b)(2)					X	
4(b)(3)	X					
4(c)			X			
5(a)			X			
5(b)			X			
6(a)			X			
6(b)			X			
7		X				
Subtotals 21	2	2	15	0	2	3
Grand totals:						
Number 358	52	43	158	33	72	21
Percent 100	15	12	44	9	20	6
			263 73%			

Source: R. 211-16; *Specifications of Default; Defendant's Comments on Specifications of Default.*

APPENDIX D

The status and disposition below of the 358 items in the 9 orders:



Source: This chart is based on the totals in Appendix C, which is in turn based on the opinion of the district court, the stipulation of facts, and St. Regis' post-trial memorandum setting out its version of the facts of compliance (accepted as correct here). The segments of the chart, reading clockwise from the 12 o'clock position, correspond respectively to columns 3, 2, 6, 5, 4 (less 7), and 7 of Appendix C.

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